TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted]70

EMMONS COAL MINING COMPANY AND THE FIDELITY & CASUALTY COMPANY OF NEW YORK, PLAINTIFFS IN ERROR,

vs.

NORFOLK & WESTERN RAILWAY COMPANY

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

FILED APRIL 17, 1925

(31,046)

(31,046)

SUPREME COURT OF THE UNITED STATES

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No. 367

EMMONS COAL MINING COMPANY AND THE FIDELITY & CASUALTY COMPANY OF NEW YORK, PLAINTIFFS IN ERROR,

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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

District Court of the United States

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

December Term, 1921. No. 8922.

NORFOLK & WESTERN RAILWAY COMPANY,

v.

EMMONS COAL MINING COMPANY, FIDELITY & CASUALTY COMPANY OF NEW YORK.

T. W. Reath.

Wm. G. Wright, for Fidelity & Casualty Company of N. Y.

Conlen, Brinton & Acker, for Emmons Coal Mining Company.

DOCKET ENTRIES.

Jan.	6, 1922.	Præcipe for Summons, filed.
"	6, "	Summons exit—returnable first Monday in February, 1922.
"	6, "	Statement of claim, filed.
"	6, "	Exhibits A, B, C, C-1, D, D-1, E, E-1, F, F-1, G, G-1, H, I, and K, filed.
"	6, "	Notice to file Affidavit of Defense, filed.
"	10, "	Appearance of Wm. G. Wright for Fidelity & Casualty Company of New York, filed.
"	10, "	Summons returned: January 9—served as to each defendant and filed.
"	10, "	Acceptance of service of Statement of Claim by Emmons Coal Mining Company, filed.
"	10, "	Acceptance of service by Fidelity & Casualty Company of N. Y. of Statement of Claim, filed.

Feb.	6, 1922.	Appearance of G. L. Baker, K. K. Gartner and Conlen, Brinton & Acker, for Emmons Coal Mining Company, filed.
"	6, "	Affidavit of Defense raising Questions of Law of Emmons Coal Mining Company, filed.
"	6, "	Exhibits A., B., and C., filed.
"	6, "	Affidavit of Defense raising questions of Law of Fidelity and Casualty Company of New York, filed.
"	6, "	Exhibits A and B filed.
"	14, "	Præcipe to place case on Argument List, filed.
June	7, 1922.	Argued sur Demurrer.
Sept.	21, 1922.	Order of Court directing that case be set down for re-argument, filed.
Dec.	18, 1922.	Re-argument.
Mar.	9, 1923.	Opinion, Thompson, J., overruling defenses of law and granting leave to file affidavit of Defense as to merits, filed.
"	23, "	Petition of defendant for rule on plaintiff to show cause why it should not furnish certain information, filed.
"	23, "	Order of Court granting prayer of petition—Rule returnable March 23, 1923, filed.
"	23, "	Argued sur Rule on plaintiff to show cause why it should not furnish certain information—Eo die—Rule absolute as to Paragraph B. and discharged as to Paragraph A.
"	11, "	Affidavit of defense of Fidelity & Casualty Company of New York, filed.

Mar. 11, 1923.	Affidavit of Defense of Emmons Coal Mining Company, filed.
May 12, 1923.	Rule on Emmons Coal Mining Company to show cause why judgment should not be entered against it for amount as to which affidavit of defense is insufficient, filed.
" 12, "	Rule on Fidelity and Casualty Company of New York to show cause why judgment should not be entered against it for amount as to which affidavit is insufficient, filed.
" 16, "	Rule on Emmons Coal Mining Company to show cause why judgment should not be entered against it for amount as to which affidavit of Defense is insufficient, filed.
" 16, "	Rule on Fidelity and Casualty Company of New York to show cause why judgment should not be entered against it for amount as to which affidavit of Defense is insufficient, filed.
Oct. 18, 1923.	Argued sur Rule for Judgment for want of sufficient affidavit of Defense.
Jan. 24, 1924.	Opinion, Thompson, J., making absolute Rule for Judgment for want of sufficient affidavit of defense, filed.
Apr. 30, 1924.	Order for Judgment and assessment of damages, filed.
" 30, "	Judgment, filed.
" 30, "	Assignments of Error, filed.
" 30, "	Petition for Writ of Error, filed.
May 1, 1924.	Order of Court granting Writ of Error, filed.

May 1, 1924. Stipulation of counsel as to entry of bond on appeal in $4000, filed.
" 1, " Bond sur Writ of Error in $4000, filed.
" 1, " Order of Court approving Bond sur Writ of Error, filed.
" 1, " Copy of Notice of Appeal filed.
" 2, " Writ of Error allowed and copy thereof lodged in Clerk's office for adverse party.
" 2, " Citation allowed and issued.
" 6, " Citation returned service accepted and filed.
June 13, 1924. Stipulation of Counsel as to Tran script of record sur Writ of Error, filed.

WRIT OF ERROR.

UNITED STATES OF AMERICA, *ss.:*

THE PRESIDENT OF THE UNITED STATES,

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania,

GREETING:

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Norfolk & Western Railway Company and Emmons Coal Mining Company and The Fidelity & Casualty Company of New York, a manifest error hath happened, to the great damage of the said Emmons Coal Mining Company and The Fidelity & Casualty Company of New York as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, together with this writ, so that you have the same at the City of Philadelphia, within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of
(Seal) the United States, at Philadelphia, the second day of May, in the year of our Lord one thousand nine hundred and twenty-four.

GEORGE BRODBECK,
Clerk of the United States District Court, Eastern District of Pennsylvania.

Allowed by

J. W. THOMPSON,
District Judge.

IN THE UNITED STATES DISTRICT COURT, FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

December Sessions, 1921. No. 8922.

Norfolk and Western Railway Company,
A Corporation,

v.

Emmons Coal Mining Company,
A Corporation,

The Fidelity & Casualty Company of New York,
A Corporation.

PLAINTIFF'S STATEMENT OF CLAIM.
(Filed January 6, 1922.)

Norfolk and Western Railway Company, a corporation organized and existing under the laws of the State of Virginia, hereinafter called the Railway Company, claims of Emmons Coal Mining Company, a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, and doing business in the City and County of Philadelphia, Pennsylvania, hereinafter called Coal Company, the sum of sixteen thousand, two hundred and thirty-seven dollars and forty-two cents ($16,237.42); and of The Fidelity & Casualty Company of New York, a corporation organized and existing under and by virtue of the laws of the State of New York, and doing business in the City and County of Philadelphia, Pennsylvania, hereinafter called Surety Company, the sum of ten thousand ($10,000) dollars, with interest thereon from the respective dates of accrual of the items included

in said sums, which is justly due upon a cause of action whereof the following is a statement:

1. The Railway Company was at the time the cause of action hereinafter set forth accrued and is a common carrier of freight, owning and operating lines of steam railroad in and through the States of Virginia, West Virginia, Kentucky, Ohio and North Carolina, and in the operation of its railroad the Railway Company was at the time above mentioned a common carrier of freight in interstate commerce subject to the Act of Congress of February 4, 1887, known as the Act to Regulate Commerce, and the acts amendatory thereof.

2. That before the cause of action hereinafter set forth accrued the Railway Company had filed with the Interstate Commerce Commission and had published, in accordance with the Act to Regulate Commerce as amended, a tariff of charges for demurrage on cars containing bituminous coal for trans-shipment by vessel at Norfolk and Lambert Point, Virginia, and had furnished copies of said tariff to its freight offices, for posting therein, including Lambert Point, Virginia. The said tariff is known as Tariff C. & C. No. 4056, I. C. C. No. 2828-B, and was legally effective during all of the time for which demurrage is hereinafter claimed.

A true copy of said tariff is annexed hereto and made part hereof, marked Exhibit "A."

3. By the said tariff a charge of $2 per car per day or fraction of a day after the expiration of the free time therein allowed is prescribed for the detention or demurrage of cars on the Railway Company's Norfolk terminals defined in the tariff as including Lambert Point. The free time allowed by the tariff is five days per car. In computing time under the

tariff Sundays and designated legal holidays are excluded, the following Monday being excluded when the legal holiday falls on a Sunday. Time is computed from the first 7 A. M. *after the day on which notice of arrival is sent or given to the consignee;* and a car is deemed released at the time the vessel registers into which the coal or its equivalent is dumped. There is further provision of the tariff designed to avoid delay that would be entailed switching out and delivering on shipper's order in actual sequence of arrival cars containing the same grade of coal as indicated by identifying consigning names or numbers on the waybills. By this provision the dates on which cars would have been released if released in order of arrival will be substituted for the dates on which equivalent tonnage was actually delivered and the detention computed on the basis of such substituted dates. Under the tariff demurrage accounts are made up monthly including all cars released during the month; the date of sending or giving of arrival notice is substracted from the date of release and from total days' detention intervening Sundays, legal holidays and the five days' free time allowance per car are subtracted. The remainder, if any, gives the number of demurrage days chargeable at $2 per car. Excess credit days of one month can not be deducted from excess debit days of another month.

4. The Railway Company avers that at various times during the months of September, October and December, 1920, and January, February and March, 1921, the Coal Company received at Lambert Point, Virginia, and disposed of by trans-shipment in vessels, the equivalent in tonnage and in grade (as indicated by identifying consigning numbers) of carload shipments of coal, which coal had been transported in cars in interstate commerce by the Railway Company,

consigned to the Coal Company, care of Lamberts Point Coal Exchange, at Lambert Point, Virginia.

5. To facilitate operation of the railway and the business of its patrons at the tidewater terminal piers of the Railway Company at Lambert Point, the Lamberts Point Coal Exchange was organized. Shippers and consignees of tidewater coal handled at said piers are eligible for membership in the exchange. The Coal Company was and is a member of the exchange during all of the time for which the demurrage hereinafter claimed accrued, and subscribed to *agreements* providing for the handling of its coal in conformity with the regulations governing the exchange. A printed copy of the exchange rules is annexed hereto and made a part hereof marked Exhibit "B." Under these rules the exchange members agree to the grading of their coal and agree in shipping to indicate the grade by certain identifying consigning pool numbers to the end that any member of the exchange having consigned coal of a given grade in care of the exchange may through the agency of the exchange dispose of an equal amount of any coal of like grade also consigned in care of the exchange and standing on the Norfolk terminals of the Railway Company. Members further agree that their shipping instructions to the Railway Company shall show as the consignee the name of the member for whose account the coal was shipped, followed by the words "Care Lamberts Point Coal Exchange, Pool ——" (giving the identifying consigning number), and they also agree to pay demurrage charges accruing on their individual accounts. Explicitly the rules provide (Rule 31) that credit car days of a member shipping in care of the exchange shall not offset debits of another member.

6. The Railway Company avers that the Coal Company failed to dispose of the coal so consigned

to the Coal Company, or its equivalent, within the free time provided by the tariff, whereby demurrages accrued under the tariff referred to above—Exhibit "A"—as indicated in detail in statements for each month annexed hereto and made part hereof, marked Exhibit "C," September, 1920; Exhibit "D," October, 1920; Exhibit "E," December, 1920; Exhibit "F," January, 1921; Exhibit "G," February, 1921, and Exhibit "H," March, 1921. The statements show as to each grade or consigning pool number and as to each car consigned to the Coal Company the following information:

(a) Car initial and number;
(b) The identifying consigning number indicating grade of coal;
(c) Date on which notice of arrival was given the Coal Company;
(d) Date of release which under the tariff was date of registry of vessel into which the coal contained in the car, or its equivalent, was dumped;
(e) Total days' detention;
(f) Free time, including Sundays, legal holidays and five days tariff allowance;
(g) Number of days for which demurrage is payable or credit allowable.

Supplemental statements giving in summary the result for each month of the next previous exhibit are annexed hereto and made part hereof, marked Exhibit "C-1," September, 1920; Exhibit "D-1," October, 1920; Exhibit "E-1," December, 1920; Exhibit "F-1," January, 1921; Exhibit "G-1," February, 1921, and Exhibit "H-1," March, 1921, and show the debit or credit days accrued in each month on the Coal Company's consignments separately as to each consigning pool number and the net result per month, adding

the debits for each pool consigning number or subtracting from such debits the number of credit days due.

7. The Railway Company avers that the total amount of demurrage due as indicated and set out in the foregoing Exhibits "C," "C-1," "D," "D-1," "E," "E-1," "F," "F-1," "G," "G-1," "H" and "H-1," and summarized in the total statement of account annexed hereto and made part hereof, marked Exhibit "I," is, for the month of September, 1920, $2114; for the month of October, 1920, $1028; for the month of December, 1920, $3666; for the month of January, 1921, $354; for the month of February, 1921, $160, and for the month of March, 1921, $8534. The Railway Company is required under the Tax Law of the United States to collect a tax of 3 per cent. of certain of said amounts, or $109.98, $10.62, $4.80 and $256.02. The sum of all these figures, or sixteen thousand, two hundred and thirty-seven dollars and forty-two cents ($16,237.42), as shown in Exhibit "I" heretofore referred to, is the amount due by the Coal Company to the Railway Company.

8. For the purpose of guaranteeing payment of demurrage and other tariff charges which might lawfully accrue against the Coal Company at Lambert Point, Virginia, the Railway Company took a bond from the Coal Company as principal and The Fidelity & Casualty Company of New York as surety. By the terms of this obligation as set forth in a copy of said bond annexed hereto and made part hereof, marked Exhibit "K," the Surety Company undertook and agreed to indemnify and save harmless the Railway Company, in the event of default in payment by the Coal Company of demurrage and other similar railroad charges referred to in Exhibit "K."

9. The Railway Company has repeatedly demanded payment of the said sum of sixteen thousand, two hundred and thirty-seven dollars and forty-two cents ($16,237.42), but the Coal Company has refused and still refuses to pay this sum or any part thereof. WHEREFORE, because of the Coal Company's refusal and failure to pay said demurrage the Surety Company has become and is liable to the Railway Company under the provisions of the bond, described in paragraph eight, for the sum of ten thousand ($10,000) dollars; but the Surety Company has refused and does refuse to pay said sum or any part thereof; and there is still due the sum of $16,237.42, with interest thereon from the respective dates on which each monthly demurrage account comprising the total amount accrued.

WHEREFORE, the Railway Company prays judgment against the Coal Company for the sum of sixteen thousand, two hundred and thirty-seven dollars and forty-two cents ($16,237.42), and against the Surety Company for the sum of ten thousand ($10,000) dollars, with interest as above.

NORFOLK AND WESTERN RAILWAY COMPANY,

By A. C. NEEDLES,
Vice-President.

Attest:

T. W. BOOTH,
Secretary.

Norfolk and Western
Railway Company,
Virginia.
Organized 1896.

STATE OF VIRGINIA,
CITY OF ROANOKE, }

D. E. SPANGLER, being duly sworn according to law, doth depose and say that he is general superintendent transportation of the corporation plaintiff. On its behalf he says that the facts stated in the foregoing statement of claim are true so far as they are within his knowledge; so far as they are based upon information derived from others he believes them to be true, and expects to be able to prove the same on the trial of the cause.

Sworn to and subscribed before me this 5th day of January, 1922. } D. E. SPANGLER.

W. A. CARPENTER,
Notary Public.

My commission expires February 1, 1925.

J. HAMILTON CHESTON,
F. M. RIVINUS,
THEODORE W. REATH,
Attorneys for Plaintiff.

W. A. Carpenter
Notary Public
City of Roanoke, Va.
No tax

No Supplement to this Tariff will be issued except for the purpose of cancelling the tariff.

EXHIBIT "A."

TARIFF C. & C. No. 4056
Cancels Tariff C. & C. No. 3988

I. C. C. No. 2828-B.
Cancels I. C. C. No. 2809-B.

NORFOLK & WESTERN RAILWAY CO.

DEMURRAGE RULES AND REGULATIONS

GOVERNING CARS CONTAINING

ANTHRACITE COAL, BITUMINOUS COAL, COAL BRIQUETS OR COKE

For Trans-Shipment By Vessel

—AT—

Norfolk and Lambert's Point, Va.

Issued June 25, 1920

Effective July 1, 1920

Issued on five days' notice, under special permission of the Interstate Commerce Commission, No. 30172 of June 24, 1920.

Issued by

D. E. SPANGLER,
Gen'l. Superintendent Transportation,
ROANOKE, VA.

J. R. TALBOTT
Supt. of Car Service,
ROANOKE, VA.

J. R. RUFFIN,
Freight Traffic Manager,
ROANOKE, VA.

T. D. HOBART,
General Coal Freight Agent,
ROANOKE, VA.

800

FILE

MARSCHNER'S PRINTING & LITHO. WORKS, ROANOKE, VA.

DEMURRAGE RULES AND REGULATIONS GOVERNING CARS CONTAINING ANTHRACITE COAL, BITUMINOUS COAL, COAL BRIQUETS OR COKE FOR TRANS-SHIPMENT BY VESSEL AT NORFOLK AND LAMBERT'S POINT, VA.

RULE 1—CARS SUBJECT TO RULES.

Cars containing anthracite coal, bituminous coal, coal briquets or coke, for trans-shipment direct to vessels, either cargo or fuel supply, or to be stored for shipment by vessels when held for or by consignors or consignees for unloading, forwarding directions, or for any other purpose are subject to these rules, except—

(a) Cars reconsigned or reshipped for rail delivery or to another rail destination will be subject to the National Car Demurrage Rules (J. E. Fairbanks, Agent's, I. C. C. No. 4, N. & W. Tariff No. 10001-T), supplements thereto and reissues thereof, from arrival.

NOTE—Norfolk Terminals consist of a system of main and connecting side tracks extending from Mile Post 8 at the western boundary of said terminals to the piers and tracks adjacent at Lambert's Point. Coal, coal briquets or coke for delivery to vessels held in cars on tracks within the boundaries of Norfolk Terminals is available for delivery to the piers upon customary notice of owner.

RULE 2—FREE TIME ALLOWED.

An average of five (5) days per car free time will be allowed, except on coke for export, on which an average of ten (10) days per car free time will be allowed.

RULE 3—COMPUTING TIME.

(a) A notice of arrival must be sent or given to the consignee in writing or as otherwise agreed to by carrier and consignee upon arrival of cars and billing at Norfolk Terminals, Va.

Time will be computed from the first 7 A. M. after the day on which notice of arrival is sent or given to the consignee.

NOTE—In computing time Sundays and legal holidays (national, state and municipal), but not half-holidays, will be excluded. When a legal holiday falls on Sunday, the following Monday will be excluded.

The following are legal holidays:

January 1st	New Years Day.
January 19th	Lee's Birthday.
February 22d	Washington's Birthday.
May 30th	Memorial Day.
July 4th	Declaration Day.
First Monday in September	Labor Day.
Tuesday following first Monday in November	General Election Day.
Thanksgiving Day	Generally last Thursday in November.
December 25th	Christmas Day.

(b) A car shall be considered as released:

1. At the time vessel registers for the cargo or fuel supply of which the coal, coal briquets or coke dumped into such vessel is a part, except that when cars are unloaded before the vessel registers such cars shall be released when unloaded.
2. To avoid delay that would be entailed in switching out and delivering on shipper's order, in actual sequence of arrival, cars containing the same grade of coal, as indicated by the identifying consigning names or numbers on the waybills, the dates on which cars should have been so released (as indicated by the record) will be substituted for the dates on which equivalent tonnage was actually delivered and the detention will be computed on the basis of such substituted dates.
3. The dates shipments are transferred by written order and acceptance to another party shall be considered the date of release of the car for the account of the original consignee and subsequent detention shall be charged in the account of the new consignee without any free time allowance.
4. Any fraction of a day will be computed as one day.

RULE 4—DEMURRAGE CHARGES.

Settlement shall be made on the basis of detention to all cars released during the month. The date of arrival notice shall be subtracted from the date of release. From the total days detention to all cars thus obtained, deduct all Sundays and legal holidays following the date of arrival and five (5) days free time allowance for each car, except on cars containing coke for export deduct ten (10) days free time allowance for each car; the remainder, if any, will be the number of days to be charged at the rate of $2.00 per car per day. Excess credit days of any one month cannot be deducted from the excess debit days of another month.

EXHIBIT "B."

ARTICLES OF ORGANIZATION AND RULES OF THE LAMBERTS POINT COAL EXCHANGE

ARTICLES OF ORGANIZATION AND RULES
OF THE
LAMBERTS POINT COAL EXCHANGE

1. NAME. The name of the organization is the Lamberts Point Coal Exchange. Besides its object as set out below, it is established as a measure to meet the suggestions and to aid in accomplishing the purposes of the Interstate Commerce Commission in its endeavors to improve transportation service.

2. OBJECT. The organization of the Lamberts Point Coal Exchange is for the purpose of reducing coal classifications and necessary switching thereof; and to facilitate dumping, thereby expediting the despatch of vessels and augmenting car supply at the mines; and is to (a) Act as an Agency for the Pooling of coal, and to execute to the Norfolk & Western Railway Company orders of the members for delivery of tonnage to vessels; permitting the use by a shipper of coal of the same pool to which the member has made shipments, and to the extent of such contributions, without being required to apply on the delivery order of a member the identical coal consigned to him; and (b) To maintain a complete record of all shipments of coal consigned by the members in the various classifications and of orders received from members and executed to the Railway Company covering delivery of coal to vessels.

3. To accomplish the above-mentioned object the Norfolk & Western Railway agrees to appoint a Manager to administer the affairs of the Exchange, and to pay his salary and expenses of his office, and to defray expense of coal inspection as referred to in Article 13.

4. MEMBERSHIP. A shipper or consignee of Tidewater coal moving over the Lamberts Point piers of the N. & W. Railway, may become a member of the Exchange by (a) Furnishing references which meet the approval of the Executive Committee; (b) Subscribing to agreements providing for the handling of his (or its) coal in conformity with regulations governing the Exchange; and (c) Conditioned upon receipt of notice by the Manager of the Exchange from the Railway Company that the applicant has furnished to the Railway Company a bond to cover car demurrage and other lawful charges, and has presented to it satisfying evidence of ability to furnish vessels promptly upon assembling of cargoes.

5. REGULATION OF SHIPMENTS. The right to regulate shipments of coal in care of the Exchange is recognized as a railroad function, and the exercise of this prerogative by the Railway Company will be through its Transportation Department, and the available vessel supply of a member together with the railroad transportation conditions will govern the acceptance of shipments by the Railway Company. Members, therefore, must furnish direct to the Railway Company information required as to vessel tonnage and expected arrival thereof.

6. DELIVERY ORDERS. The Exchange will neither record nor take cognizance of sales of tonnage between members, and, as to disposition of coal once in a pool, will only execute orders of a member which call for delivery of tonnage to a vessel or for reconsignment by rail to a consuming consignee or retail dealer. (See Rules 14 and 26.)

7. EXECUTIVE COMMITTEE. An Executive Committee consisting of seven members shall be formed in the following manner: One appointed by the Railway Com-

pany, the Manager of the Exchange as member ex officio, two members from the Pocahontas District and one from each the Tug River, Thacker and Clinch Valley Districts to be elected by the membership at each annual meeting.

8. ANNUAL MEETING. The annual meeting of the Lamberts Point Coal Exchange shall be called by the Chairman of the Executive Committee for the second Friday in July of each year. The members present at such annual meeting shall constitute a quorum. Each member shall have one vote for each 5,000 tons of coal, or fraction, shipped through the Exchange monthly on the average during the immediately preceding year; the monthly average to be determined by dividing the total tonnage shipped during the year by the number of months in which the coal was shipped.

9. Elected members of the Executive Committee shall serve for a term of one year from the date of the annual meeting, and until their successors take office; vacancies shall be filled by the Executive Committee.

10. No person shall be elected to the Executive Committee whose company or firm is not a member of the Exchange.

11. The Executive Committee shall exercise supervision over the affairs of the Exchange to the extent herein provided, and may after due hearing amend the rules of the Exchange by affirmative vote concurred in by the representative of the Railway Company thereon. It shall meet on call of the Chairman.

12. All coal consigned in the Exchange classifications shall be graded and classified in designated pools

under the direction of the Executive Committee which shall have general charge of establishing or abolishing pools or classifications. Temporarily Classification "B" revised March 18, 1920, of the "Tidewater Coal Exchange" will be used.

13. The Executive Committee shall at all times protect the quality of coal shipped into the pool, through the Manager and a system of inspection, and analysis if necessary in their opinion, and may at any time suspend shipments from any mine when in their judgment the quality or preparation of such coal is below the proper standards.

14. All orders for delivery of coal to vessels must be placed with the Manager of the Exchange.

15. Coal will be taken into the records of the Exchange daily as it passes billing points. Members shall be entitled to receive coal from a classification on their orders according to priority of vessel register, but no orders for delivey of coal will be executed in excess of the tonnage standing in the name of a member on the Exchange records. Members, however, may enter into borrow and loan transactions as may be mutually advantageous to themselves, and the Manager shall at all times be available to act as an intermediary in such transactions to the extent he may be authorized by individual members.

16. In order to properly protect the charges of the carriers, it will be necessary for members of the Lamberts Point Coal Exchange to file with the Railway Company orders to make deliveries on the instructions of the Manager or his authorized representatives and members must furnish a blanket order as follows:

"Until further notice the Norfolk & Western Railway is hereby authorized to accept from the Manager of the Lamberts Point Coal Exchange his orders for delivery of any coal consigned for account of the undersigned in care of the Lamberts Point Coal Exchange."

17. Members of the Exchange, for whose account coal is shipped to the piers, shall be responsible to the Norfolk & Western Railway Company for demurrage charges accruing for their account, and for the freight charges (when waybilled collect), and vessel loading charges on coal unloaded into vessels for their account. Members shall file an agreement with the Railway Company as follows:

"I (or we) hereby agree to pay freight charges (when waybilled collect), and vessel loading charges on coal unloaded into vessels for my (or our) account on orders executed by the Manager of the Lamberts Point Coal Exchange, provided that bills for freight charges shall be so adjusted that they will not exceed the rates applicable on coal shipped to the piers for my (or our) account. The undersigned further agrees to pay any demurrage accruals under the tariff of the Railway Company, car days detention to be computed by subtracting the date of arrival of cars shipped for account of the undersigned from the date of release of equivalent cars."

18. Tidewater coal shippers and consignees must execute agreements in the form referred to in Articles 16 and 17 (Exchange Form B), and file one copy with the Norfolk & Western Railway Company and one copy with the Manager of the Exchange.

19. The Railway Company will furnish to the Manager of the Exchange by telegraph daily from bill-

ing points a report of carloads of coal (separated as to large cars and others) billed during the preceding 24 hours for account of each member, and a report by mail daily from the same source on Exchange Form 1.

20. The Manager will report currently to each member the tonnage added to or deducted from his account.

21. For the regulatory purposes of the railroad, and for information of members, a daily statement of estimated coal tonnage between waybilling points and the piers and vessel tonnage at the piers for account of each member, shall be mailed to all members of the Exchange and the railroad by the Manager. Members will subscribe to this by agreement on Exchange Form "C."

22. Adjustments on basis of actual weights determined shall be frequently made in estimated tonnage statements, and an abstract of account based on actual weight of coal shipped and delivered shall be rendered by the Manager to each member at intervals not exceeding one month.

23. Shipping instructions and railroad waybills (revenue and memorandum) shall show as the consignee the name of the member for whose account shipped, followed by the words "care Lamberts Point Coal Exchange Pool ———." Operators must consign coal in accordance with the classification of their mines.

24. Agents of the Railway Company at waybilling points will be supplied with copies of classifications and will see that all coal billed is consigned to the proper pool number, regardless of the pool number placed on consignment forms by operator. If any mine persists in consigning to improper pool number, Bili-

ing Agent will report violation to the Manager of the Exchange, whereupon the mine will be embargoed from shipping in care of the Lamberts Point Coal Exchange.

25. No mine will be permitted to ship in care of the Lamberts Point Coal Exchange unless included in the classifications, reissues thereof, or supplements thereto. Any mine not so classified and which has orders for tidewater shipments, and desires to ship through the Exchange, should make application to the Manager for classification, when prompt investigation will be made and the mine added to classification list. The Norfolk & Western Railway will place embargo against shipments in care of the Lamberts Point Coal Exchange from unclassified mines.

26. The Railway Company will report to the Exchange corrections in billing involving weights and will send to members and to the Exchange daily report showing the reconsignment of shipments from or to the Exchange. No reconsignment to or from the Exchange will be made unless authorized by the Manager.

27. The Railway Company will report daily to the Exchange the number of cars of each pool at the port and en route and the approximate time of arrival in twenty-four hour periods.

28. Members shall report to the Exchange the names of the vessels which they have chartered for loading for their account, with the tonnage and pool number of the coal to be loaded into each and the probable arriving time of the vessels at the coal pier.

29. Cars containing coal which is rejected by the Inspectors of the Exchange from any particular pool, shall be designated as "unclassified" and responsibil-

ity for the disposition of same shall rest with the member on whose account the coal was shipped.

30. In all documents issued for the purpose of certifying the weight of coal loaded into vessels, the Railway Company, as agent for members, shall specify the amount of coal loaded in each vessel from each pool, the total amount of pool coal, the total amount of unclassified coal, if any, and the total coal loaded in the vessel. The Manager is authorized to furnish to shippers or consignee of the vessel, a statement showing the tonnage of each pool loaded in the vessel.

31. Car demurrage will be assessed by the Railway Company, on the average basis, for the account of individual shipper responsible. Detention will be computed by subtracting the date of arrival of cars shipped from date of release of equivalent cars. Credit car days of a member shipping in care of the Lamberts Point Coal Exchange, shall not offset debits of another member.

32. The Manager of the Exchange will maintain such records as may be required to show the disposition made of each car of coal handled through the Exchange.

33. Controversies with reference to the operation of the Exchange which cannot be adjusted by the Manager, shall be submitted to the Executive Committee for decision, subject to appeal to other bodies or to the courts as may be proper.

34. Any member willfully or persistently violating these rules to the injury of the Exchange, the Railway Company or fellow members, may be deprived of membership in the Exchange by the Executive Committee, after due hearing.

35. The Railway Company may discontinue the Exchange upon thirty days' notice to the members. Any member desiring to withdraw from the Exchange shall give written notice to the Manager of the Exchange at least thirty days prior to the date on which he wishes to terminate his membership, and shall be permitted to withdraw on the last day of the next succeeding month, provided he has liquidated his obligations to the Exchange.

36. In closing accounts, when differences between the tonnage of coal shipped by a member and the tonnage dumped into vessels for his account exist, due to variation in estimated weight of coal shipped from actual weight as determined, or for any other reason, and the differences cannot be adjusted by additional shipments, the debit shall be made good by payment for the tonnage involved at a fair market price as of the date the debit was determined.

EXHIBIT "C"

C. T. 202

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of September, 1920

Consigned in name of Pool 5 for account of Simmons Coal Co. Sheet No. 1

ACTUAL ORDER IN WHICH CARS WERE UNLOADED — CARS					ACTUAL ORDER IN WHICH CARS ARRIVED — CARS							DEMURRAGE					
INITIALS	NUMBER	Date Unloaded	UNLOADED INTO BOAT Name of Boat	UNLOADED INTO BOAT Destination (for Harbor Use)	Date Arrived	Date of Notice	INITIALS	NUMBER	Returned Marked Capacity Actual Gross Weight (pounds)	Date Unloaded	Total Days Delay	TOTAL DAYS DETENTION (Sundays and Legal Holidays Excluded)	DEDUCTION IN DAYS Sundays and Legal Holidays	DEDUCTION IN DAYS From Tracks	DEDUCTION IN DAYS TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
		9/11	SS Edenfield	9/9	8/14	8/15		5314	117600			<demurrage charged in July 1920>					
			2139100 lbs		8/18	8/19		106336	91800		24	21	4	5	9	0	12
					5/19	8/20		101135	89000		23	20					11
								2085	93600								11
								107360	101400								11
					8/21	8/22		43229	102600		21	18	3		8		10
					8/22	8/23		24447	98300		20	17					9
								134477	107900		20	17					9
					8/24	8/25		3534	96700		18	15					7
					8/26	—		302005	108000		16		<Receipts limit>				
						—		44895	92300		16		"	"	"		
						8/27		79090	105000		16	13	3	5	8	0	5
					8/27	—		21877	104800		15		<Receipts limit>				
						—		92217	78800				-	-	-		
						8/28		57479	96500		12	3	5	8	0	4	
								3201	99700		12	3			8		4
					8/28	8/29		5319	110100		14	11	2		7		4
								5085	115500				2				4
								2048	107700				2				4
					9/1	9/2		50 28	119000		10	7	2				0
								74999	98800		10	7	2				0
		9/27			9/28	9/29		40226	170000		0	0	0		5	5	0
		9/11	SS Edenfield	9/9	11/30	12/1		68498	99700							5	
			2149080 lbs					83978	118900							5	

State when Shipment Left Pier and Destination, A Summary Over Railroads

TOTALS 324 23 47 95 142 15 105

SUMMARY

Total Days Debited . . . . . ____

Total Days Credited . . . . . ____

Balance Chargeable @ $1.00 Per Day . . . . . ____ Amount Due $ ____

C-1

C. T. 20c
Revised 8-26-20

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of September, 1920

Consigned in name of Coal to for account of Eminent Coal Co. Sheet No. 1

ACTUAL ORDER IN WHICH CARS WERE UNLOADED — CARS					ACTUAL ORDER IN WHICH CARS ARRIVED — CARS						DEMURRAGE						
INITIALS	NUMBER	Date Unloaded	UNLOADED INTO BOAT — Name of Boat	UNLOADED INTO BOAT — Net Registered Per Rule 3 (b)	Date Arrived	Date of Notice	INITIALS	NUMBER	Actual Commercial Weight (Deduct Excess Pounds)	Date Un-loaded	Total Days Delay	TOTAL DAYS DETENTION (Subtract Allow. Col. G from Col. E)	DEDUCTION IN DAYS — Sundays and Legal Holidays	DEDUCTION IN DAYS — Free Time	DEDUCTION IN DAYS — TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
1		9/14	B Hanan 1109800 lbs	9/19	8/20	8/21	CCO	40765	102600	7800 29900							
2							Dun	5208	105700		25	23	5	5	10	0	13
3								5103	105600								13
4								26141	98900								13
5							Dow	97523	105600								13
6								99546	108300								13
7							P&R	87430	103300								13
8							N&W	50146	99700								13
9					8/21	8/22	Dow	98025	108000		24	22	4		9		13
10							CCO	43161	108000		24	22	4				13
11					8/22	8/23	N&W	39502	100600		23	21	4				12
12								56200	100100	12488 24988	23	21	4				12
13		9/20	B Muskegon 3134000	9/17			Dun	5323	116200		29	25	4				16
14								5205	117100								16
15							Dow	107037	103700								16
16							P&O	144866	131000								16
17																	
18																	
19																	
20																	
21																	
22																	
23																	
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40																	
41																	
42																	
43																	
44																	
45																	
46																	
47																	
48																	
49																	
50																	
TOTALS											385	347	67	75	142	0	206

SUMMARY

Total Days Debited - - - - - - - - - - - - - - _____

Total Days Credited - - - - - - - - - - - - - - _____

Demurrage Charges @ $1.00 Per Day - - - - - - - _____ Amount Due $ _____

C-2

C. T. 302
Revised 6-30-20

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of September, 1920

Consigned in name of Pier 6 for account of Inmans/Cons Co Sheet No. 2

ACTUAL ORDER IN WHICH CARS WERE UNLOADED — CARS					ACTUAL ORDER IN WHICH CARS ARRIVED — CARS						DEMURRAGE					
INITIALS	NUMBER	Date Unloaded	UNLOADED INTO BOAT: Name of Boat	UNLOADED INTO BOAT: Date Assigned for Berth	Date Arrived	Date of Notice	INITIALS	NUMBER	Actual Weight (Gross less Tare)	Date Unloaded	Total Days Delay	TOTAL DAYS DETENTION (Demurrage Rules 1st Clause 1st & 2d)	DEDUCTION IN DAYS: Sundays and Legal Holidays	DEDUCTION IN DAYS: Free Time	DEDUCTION IN DAYS: TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
		9/20	Pt Washington	9/17	8/25	8/23	NSM	73176	98500		29	26	4	5	9	0	16
							CRO	43940	116900								16
							Dub	5154	115800								16
					8/30	8/24	NSM	57697	100700		28	24					15
					8/24	8/26	Dub	26191	110000		27	23					14
							NSM	58971	101700								14
							Dub	2665	106100								14
								5119	105100								14
							CRO	42146	108000								14
							C&O	44147	103000								14
					8/25	8/26	Dub	5181	118000		26	22					13
							NSM	7258	117700								13
							Dub	2916	110300								13
							NSM	2119	100300								13
							CRO	244273	105800								13
							NSM	84852	109800								13
							Dub	2644	111800								13
							NSM	8378	118700								13
								79211	110300								13
							Hamp	16059	103900								13
							NSM	81666	110000								13
								80727	107300								13
							CRO	40619	102000								13
								44570	109100	9/20							13
		9/20	Pt Washington Shortage 1 Car	9/19				18307	120000								13
								44471	113600								13
					8/27	8/28		17710	83000		24	20					11
					8/28	8/29	CBQ	177931	110000		23	19	3		8		11
							C&O	[illegible]	103700								11
							NSM	75009	96700								11
								54168	99600								11
					8/30	8/31	CBQ	55561	107500		21	17					9
							NSM	81137	114600								9
							Dub	2805	104700								9
							NSM	55091	99800								9
							CBQ	157378	104000								9
							NSM	82906	114000								9
								73273	97700		19	15					7
					9/1	9/2	C&O	60475	103500								7
							C&O	127164	105600								7
							NSM	55371	97700								7
								53309	94200								7
								58346	99800								7
								58061	99400								7
							CBQ	204716	105500								7
							C&O	28858	105600								7
							NSM	54107	98400								7
							CBQ	187191	145500								7
							C&O	94581	134600								7
					9/2	9/3	NSM	57354	97700		18	14					6
										TOTALS	1181	981	177	260	437	0	554

SUMMARY
Total Days Debited _____
Total Days Credited _____
Balance Chargeable @ $1.00 Per Day _____ Amount Due $ _____

C-3

C. T. 202
Revised 6-16-20

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of September, 1920

Consigned in name of Pool 6 for account of Inmont Coal Co. Sheet No. 3

ACTUAL ORDER IN WHICH CARS WERE UNLOADED					ACTUAL ORDER IN WHICH CARS ARRIVED						DEMURRAGE					
CARS			UNLOADED INTO BOAT		CARS							DEDUCTION IN DAYS				
INITIALS	NUMBER	Date Unloaded	Name of Boat	Date Registered Per Rule 5 (b)*	Date Arrived	Date of Notice	INITIALS	NUMBER	Actual Weight (Short Tons)	Date Un-loaded	Total Days Delay	TOTAL DAYS DETENTION (Exclusive of Rule Cat. G Hours Out, &c.)	Sundays and Legal Holidays	Free Time	TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
		9/10	Monongahela	9/11	9/7	9/8	WM	8789	107700		18	13	3	5	8	0	5
					9/7	9/8	CP	139733	106300		13	9	1		6		2
					9/8	9/9	NW	53714	100000		12	7					1
								85849	101600								1
							CP	709137	107000								1
							NW	58347	98800								0
		9/9				9/10	CP&O	41988	101800		11	6					
								40476	108100		11	6					
		9/10			9/10	9/11	NW	51179	95900		10	5				1	
		9/11			9/11	9/12		76503	101100		9	4	0		5	1	
								52915	98000								
							NW&KA	1083	105200								
							CP&O	44917	107800								
							O&W	21609	103400								
								150951	107800								
							Erie	30949	103200								
		9/13			9/13	9/14	NW	55860	99100		7	2				3	
							O&W	409478	137300								
							CP&O	44678	114800								
								42698	107000								
								40947	105800								
		9/14			9/14	9/15		43697	111500		6	1				4	
								41507	111500								
								41866	113800								
							Sou	260985	67000								
							Nye	40288	96300	2000							

C. T. 282
Revised 6-25-17

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of September, 1920

Consigned in name of Boone 7 for account of Emmanuel Coal Co, Sheet No. 1

ACTUAL ORDER IN WHICH CARS WERE UNLOADED					ACTUAL ORDER IN WHICH CARS ARRIVED						DEMURRAGE					
CARS			UNLOADED INTO BOAT		CARS							DEDUCTION IN DAYS				
INITIALS	NUMBER	Date Unloaded	Name of Boat	Tons Registered Per Item 3 (a)	Date Arrived	Date of Notice	INITIALS	NUMBER	Actual Weight Gross Tons Pounds	Date Unloaded	Total Days Delay	TOTAL DAYS DETENTION (Subtract Above Col. G From Col. K)	Sundays and Legal Holidays	Free Time	TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
		9/11	Thelma Miller 355500 lbs	9/9	8/7	8/8	Duh	10106	104400	9200 COO		(demurrage clg 8 inc July 1920)					
					8/26	8/26	NKM	58511	93600		17	14	3	5	8	0	6
					8/26	8/27		56213	95300		16	13	3	5	8	0	5
					8/25	8/29	Bow	106668	84200		17	11	2	5	7	0	4
					8/29	8/30	NKM	55278	94200	74838	19	(Hoc'd ge but no Date to be clgd)					

C. Y. 202
Revised 6-26-20

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of September, 1920

Consigned in name of Pool 13 for account of Emmanuel Coal Co Sheet No. 1

ACTUAL ORDER IN WHICH CARS WERE UNLOADED					ACTUAL ORDER IN WHICH CARS ARRIVED							DEMURRAGE				
CARS			UNLOADED INTO BOAT		CARS											
INITIALS	NUMBER	Date Unloaded	Name of Boat	If required Per Rule 7	Date Arrived	Date of Notice	INITIALS	NUMBER	Actual Weight (Same as Forward)	Date Unloaded	Total Days Delay	TOTAL DAYS DEDUCTION (Columns above Col. G from Col. E)	DEDUCTION IN DAYS Sundays and Legal Holidays	Free Time	TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
		9/22	39 Mud Pilot 73 2401 Lbs	9/21	8/14	8/15	Just	5162	113700		34	37	6	5	11	0	23
					8/19	8/20		5331	125800		34	37					21
								5060	120700		34	37					21
								5144	113400		34	37					21
		8/22			8/23	8/23	CC&O	46136	114900		31	29	5		10		19
							Just	5231	111200		31	29					19
		8/22			8/26	8/26	C&E	37263	109000 ~~78500~~		28	26					16

C. T. 202
Revised 6-20-20

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of September, 1920

Consigned in name of Pier 39 for account of Emmons Coal Co, Sheet No 1

ACTUAL ORDER IN WHICH CARS WERE UNLOADED					ACTUAL ORDER IN WHICH CARS ARRIVED						DEMURRAGE					
CARS			UNLOADED INTO BOAT		CARS							DEDUCTION IN DAYS				
INITIALS	NUMBER	Date Unloaded	Name of Boat	Tonnage Per Note 3 (a)	Date Arrived	Date of Notice	INITIALS	NUMBER	Actual Estimated Weight Gross Tons	Date Unloaded	Total Days Delay	TOTAL DAYS DETENTION (Undercut deduct Col. G from Col. E.)	Sundays and Legal Holidays	Free Time	TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
		9/20	B. Hall Jones	9/21	1 9/17	9/18	CCO	113731	101400	9/20		4 days July 2 in July					1920
			21000 lbs		2 9/17	7/30	NYE	929763	67000		55	54	9	5	14	0	38
					3 8/15	8/19	CCO	144116	111400		35	33	6	5	11	0	22
					4 "	"	PWT	58415	106000	9/22	35	33	6	5	11	0	22
					5												
					6												
					7												
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					48												
					49												
					50												
					TOTALS						175	118	21	15	36	0	82

SUMMARY

Total Days Debited	
Total Days Credited	
Balance Chargeable @ $1.00 Per Day	Amount Due $

C-7

C-7

EXHIBIT "C-1"

C. T. 208

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of September 1920

Consigned in name of _____ for account of Emmons Coal Co Sheet No Totals

ACTUAL ORDER IN WHICH CARS WERE UNLOADED					ACTUAL ORDER IN WHICH CARS ARRIVED							DEMURRAGE				
CARS			UNLOADED INTO BOAT		CARS							DEDUCTION IN DAYS				
INITIALS	NUMBER	Date Unloaded	Name of Boat	Date Received Per Rule 3 (c)	Date Arrived	Date of Notice	INITIALS	NUMBER	Estimated Weight (Gross Tons)	Date Un-loaded	Total Days Delay	TOTAL DAYS DETENTION (Reference Rules Cat. (2) Sec. (c))	Sundays and Legal Holidays	Free Time	TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
	Recapitulation				Sheet No.				Cars								
	Pool No 6					1			19		342	232				15	105
	Pool No 6					1			15		886	347				0	205
						2			50		1151	981				0	584
						3			26		228	109				43	11
							Total		91		1604	1437				43	790
	Pool No 7					1			3		58	38				0	15
	Pool No 13					1			7		281	217				0	143
	Pool No 34					1			3		145	118				0	82
									143	TOTALS	3560	2445				58	1115

C-A

SUMMARY

Total Days Debited	1115
Total Days Credited	58
Balance Chargeable @ $2.00 Per Day	1057 Amount Due $2114.00

C-A

EXHIBIT "D."

C. T. 202
Revised 6-25-20

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of October, 1920

Consigned in name of Pier 6 for account of Emmanuel Com Co Sheet No. 1

ACTUAL ORDER IN WHICH CARS WERE UNLOADED					ACTUAL ORDER IN WHICH CARS ARRIVED						DEMURRAGE						
CARS			UNLOADED INTO BOAT		CARS							DEDUCTION IN DAYS					
INITIALS	NUMBER	Date Unloaded	Name of Boat	Cubic Registered Per Rule 5 (a)	Date Arrived	Date of Notice	INITIALS	NUMBER	Actual Estimated Weight (Gross Tons) Pounds	Date Unloaded	Total Days Delay	TOTAL DAYS DETENTION (Between dates Col. G from Col. L.)	Sundays and Legal Holidays	Free Time	TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
		10/v	Sch. Jas. A. Lee	10/1	9/14	9/15	NYC	40088	96700	8000							
			do - Ceylon				CRR	44710	105000								
			3836500 lbs					40816	104000								
							DL	18699	104100								
							CRR	43034	111000								
								41337	107300								
								43436	105400								
								42297	117500								
								41974	108300								
							PRR	197114	148000								
							B&O	43638	105000								
							DL	22501	108000								
							NYC	31047	106000								
					9/15	9/16	CRR	43931	114000		17	15					8
					9/16	9/17		40570	103700		16	14					7
								44944	118300								
								43329	105000								

(Demurrage days in Sept 1920)

16 7 5 7 0 9

TOTALS 181 149 3v 80 11v 0 137

SUMMARY
Total Days Debited
Total Days Credited
Balance Chargeable @ $1.00 Per Day — Amount Due $

D-1

C. T. 111
Revised 6-12-20

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of October 1920

Consigned in name of Coal & for account of Inman Coal Co. Sheet No 2

ACTUAL ORDER IN WHICH CARS WERE UNLOADED					ACTUAL ORDER IN WHICH CARS ARRIVED							DEMURRAGE					
CARS			UNLOADED INTO BOAT		CARS								DEDUCTION IN DAYS				
INITIALS	NUMBER	Date Unloaded	Name of Boat	No. Railroad Car Was Loaded	Date Arrived	Date of Notice	INITIALS	NUMBER	Actual Weight (Subject to Correction)	Date Unloaded	Total Days Delay	TOTAL DAYS DETENTION (Inclusive Time for Which Car Is Exempt)	Sundays and Legal Holidays	Free Time	TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
		10/7	Schr. Lee de-Ceylon	10/1	9/16	9/17	CP	139685	107200		16	14	2	5	7	0	7
					9/17	9/18	C&O	44417	113600		15	13					6
								170593	111000								1
							C&O	44740	107200								4
					9/20	9/21		46097	103000		17	10	1	6			4
							PRR	8480	97000		17	10					0
					9/24	9/25	N&W	54601	96800		8	6					
							C&O	54473	104800		8	6					
					10/1	10/2	N&W	54049	98100		0	0	0	5	5	5	
							CP	73407	108600								
							CRR	13109	112900								
					10/2	10/3	C&O	70926	100000								
							N&W	80287	110600								
					10/4	10/5	N&W	40890	103000								
								41485	100300								
					10/5	10/6	N&W	83644	110300								
							PRR	30449	83000								
					10/6	10/7	N&W	54939	110600								
								54841	99600								
					10/7	10/8		70619	110700	Short Tonnage							
		10/7	SS Tilgatlow 1999500 lbs	10/6				58346	96200		0	0	0	5	5	5	0
								57518	96100								
								13510	98200								
					10/9	10/10		90603	102800	Short Tonnage							
		10/21	SS Manlenbar 2237300 lbs	10/20	10/11	10/12		7553	103700		9	7	1	5	6	0	1
							WM	10780	108900								1
							C&O	73347	110900								1
						—	N&W	77883	93400								(No Clyde Demurrage to be charged)
					10/13	10/13		38073	99100		8	6	1	5	6	0	0
						—	WM	11669	113600		8						(No Clyde Demurrage to be charged)
					10/13	10/14	C&O	43513	100500		7	5	1	5	6	1	0
							N&W	76931	98800		7	5				1	
					10/14	10/15		77049	100800		6	4				2	
					10/15	10/16	N&W	71488	104000		5	3				3	
					10/17	10/18		76975	95200		3	1	0	5	5	4	
								70564	114200		3	1				4	
					10/18	10/19		80606	105100		2	0				5	
					10/21	10/22		77800	97200		0						
					10/26	10/28		54183	99500								
								84487	103000								
					10/29	10/30		84277	107900								
								7688	116100								
							N&W	14279	114800								
							N&W	54003	96900								
								80045	104600	Short Tonnage							
											TOTALS	186	131	20	215	235	140	36

SUMMARY

Total Days Debited . . . . . ——

Total Days Credited . . . . . ——

Balance Chargeable @ $1.00 Per Day . . . . . ——— Amount Due $ ———

C. T. 202
Revised 6-20-20

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of October, 1920

Consigned in name of Pool 39 for account of Emmons Coal Co Sheet No. 1

ACTUAL ORDER IN WHICH CARS WERE UNLOADED — CARS					ACTUAL ORDER IN WHICH CARS ARRIVED — CARS						DEMURRAGE					
INITIALS	NUMBER	Date Unloaded	UNLOADED INTO BOAT: Name of Boat	UNLOADED INTO BOAT: Initials Registered Per Rule 3 (a)	Date Arrived	Date of Notice	INITIALS	NUMBER	Actual Marked Capacity Weight (Gross Less Tare)	Date Un-loaded	Total Days Delay	TOTAL DAYS DETENTION (Subtract items Col. G from Col. E.)	DEDUCTION IN DAYS: Sundays and Legal Holidays	DEDUCTION IN DAYS: Free Time	DEDUCTION IN DAYS: TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
		10/7	Tilerton 2769500 lbs	10/6	8/18	8/19	CMT	58416	109000	57500 41500		(demurrage charged in Sept 1920)					
					8/20	8/21	CSPO	40576	118000		48	46	8	5	13	0	33
							bow	98437	91500		48	46	8	5	13		33
					8/23	8/24	CSPO	41829	104500		45	43	7	5	12		31
					8/24	8/25		40178	120800		44	42	7	5	12		30
								48303	118600		44	42	7	5	12		30
					8/27	8/28	CSPO	43524	105000		41	39	7	5	12		27
							bow	18132	110700		41	39	7	5	12		27
					8/28	8/29	CSPO	20474	118400		40	38	6	5	11		27
					9/1	9/2	CSPO	12703	119000		36	34	6		11		23
					9/2	9/3	CSPO	66004	123000		35	33					22
					9/3	9/4	CSPO	127762	122400		34	32					21
					9/4	9/5	CSPO	42283	121000			(hearings had re demurrage charges)					
					9/7	9/8		43676	115000		30	28	4	5	9	0	19
					9/9	9/10		40424	109600		28	26					17
								42527	118000		28	26					17
								42473	115800		28	26					17
					9/13	9/14		42219	120000		24	22	3		8		14
								40060	118100		24	22					14
								44156	119000		24	22					14
					9/14	9/15		41017	109000		23	21					13
							bow	12353	122400		23	21					13
							CPSO	42825	118400		23	21					13
								93883	116000		23	21					13
								43510	118900	24500 41900	23	21					13
											TOTALS	757	711	115	115 730	0	481

SUMMARY

Total Days Debited . . . . . _____

Total Days Credited . . . . . _____

Balance Chargeable @ $1.00 Per Day . . . . . _____ Amount Due $ _____

D-3

EXHIBIT "D-1."

C. F. 202
Revised 6-20-20

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of October, 1920

Consigned in name of _____ for account of Emmanuel Export Co. Sheet No. Total

	ACTUAL ORDER IN WHICH CARS WERE UNLOADED — CARS					ACTUAL ORDER IN WHICH CARS ARRIVED — CARS							DEMURRAGE				
	INITIALS	NUMBER	Date Unloaded	UNLOADED INTO BOAT — Name of Boat	UNLOADED INTO BOAT — No. Registered Per Rule 3 (a)	Date Arrived	Date of Notice	INITIALS	NUMBER	Estimated Weight (Gross Tons)	Date Unloaded	Total Days Delay	TOTAL DAYS DETENTION (Inclusive dates Col. G from Col. L)	DEDUCTION IN DAYS — Sundays and Legal Holidays	Free Time	TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
1			Recapitulation			Short No.				Coal								
2																		
3			Panel No	6			1			17		281	289				0	137
4							"			46		196	131					
5								Total		63		469	380				140	36
6																	140	173
7			Panel No	39			1			25		759	711				0	481
8																		
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50																		
							8-7	TOTALS		1091							140	654

SUMMARY

Total Days Debited	654
Total Days Credited	140
Balance Chargeable @ $2.00 Per Day	514 Amount Due $ 1028.00

D. A

EXHIBIT "E."

C. T. 202
Revised 6-25-20

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of December, 1920

Consigned in name of Pier 5 for account of Eastern Coal Co. Sheet No. 1

ACTUAL ORDER IN WHICH CARS WERE UNLOADED					ACTUAL ORDER IN WHICH CARS ARRIVED							DEMURRAGE					
CARS			UNLOADED INTO BOAT		CARS												
INITIALS	NUMBER	Date Unloaded	Name of Boat	Tons Received Per Rate Tab'n	Date Arrived	Date of Notice	INITIALS	NUMBER	Actual Estimated Weight Tons Cwts.	Date Un-loaded	Total Days Delay	TOTAL DAYS DETENTION (Sundays, Holidays and Legal Holidays Excluded)	DEDUCTION IN DAYS (Sundays and Legal Holidays Excluded) Free Time	TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
		12/11	St. Hercules 12/9		11/30	12/1	NYA	8378	118900								
			236400 lbs														
								8678	70900		11	8	1	5	6	0	
								16086	100300								
								26084	110700								
								17265	84800								
					12/1	12/2	NYA	8157	99900		10	7					1
								50796	96000								
								55609	97000								
								3489	103700								
							NYA	7160	119800								
					12/2	12/3		59810	95600		9	6					0
								79534	93500								
							Bal O	36076	106700								
							CRR	19964	152100								
					12/3	12/4	NYA	75117	97200		8	5				1	
					12/4	12/5	CWB	7491	107900		7	4	0		5		
							PM&W	38187	103400		7	4					
					12/5	12/6	CRR	10241	100700		6	3				2	
					12/9	12/10	NYA	8138	122700		2	0				5	
								50099	94000								
							Wash	34552	85100								
							WM	11818	109400								
							NYA	8339	111300								
								7831	126700								
		12/28	Life Hall 12/28		12/9	12/10	NYA	75918	96900								
			Hospital														
			19700 lbs														

TOTALS 170 107 14 110 124 30 15

SUMMARY
Total Days Debited .....
Total Days Credited .....
Balance Chargeable @ $1.00 Per Day ..... Amount Due $

E-1

C. T. 202
Revised 6-26-20

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of December, 1920

Consigned in name of Pier 6 for account of Emmanuel Coal Co Sheet No. 1

ACTUAL ORDER IN WHICH CARS WERE UNLOADED					ACTUAL ORDER IN WHICH CARS ARRIVED						DEMURRAGE						
CARS			UNLOADED INTO BOAT		CARS												
INITIALS	NUMBER	Date Unloaded	Name of Boat	Tons Received (Net Tons 2 000 lbs)	Date Arrived	Date of Notice	INITIALS	NUMBER	Actual Estimated Weight (Gross Tons) Pounds	Date Unloaded	Total Days Delay	TOTAL DAYS DETENTION (Between dates Col. G from Col. K.)	DEDUCTION IN DAYS Sundays and Legal Holidays	Free Time	TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
1		12/4	Pink K		10/31	11/1		7868	136600	~~12/4~~ 12/5		⟨See November 1920⟩					
2			Nelson Gillespie 11,800 lbs	12/4	✓	✓		7076	145500	1668 11/28	24	39	7	5	12	0	21
3		11/20	Lawrence	12/18	✓	—		7710	137300		50	⟨Oct 29 - Just 20 days to be charged⟩					
4			13346 lbs		11/3	11/4	C&W 38	9922	141500		47	44	8	5	13	0	31
5																	
6																	
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TOTALS											131	99	15	10	25	0	52

SUMMARY

Total Days Debited - - - - - - - - - - - - - ——

Total Days Credited - - - - - - - - - - - - - ——

Balance Chargeable @ $1.00 Per Day - - - - - - - ——Amount Due $ ——

E-2

C. T. 202
Revised 6-26-20

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of December 1920

Consigned in name of Pool 6 for account of Emmanuel Coal Co. Sheet No. 2

ACTUAL ORDER IN WHICH CARS WERE UNLOADED					ACTUAL ORDER IN WHICH CARS ARRIVED						DEMURRAGE						
CARS			UNLOADED INTO BOAT		CARS								DEDUCTION IN DAYS				
INITIALS	NUMBER	Date Unloaded	Name of Boat	Date Released for Rule 5 Bar	Date Arrived	Date of Notice	INITIALS	NUMBER	Gross Estimated Weight (Known Tons) Pounds	Date Unloaded	Total Days Delay	Total Days Detention (Subtract date Col. D from Col. K)	Sundays and Legal Holidays	Free Time	TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
		12/20	Runaway	12/18	11/3	11/4	OL	705496	103100		47	44	8	5	13	0	31
								132877	156600								31
							NFK	13784	80300								31
								58369	100600								31
								7397	128300								31
							BH	4528	91600								31
					11/6	11/7	CAG	48120	103100		44	41	7		12		29
							NFK	8180	124600								29
								7894	126700								29
					11/7	11/8		51884	96000		43	40					28
								69796	112100		43	40					28
					11/8	11/9	WAR	1240	106600		44	39					28
					11/10	11/11	OLE	37404	102800		40	37	6		11		26
					11/11	11/12	NFK	58852	99000		39	36	6		11		25
					11/17	11/18		7000	126700		33	30	5		10		20
								53504	112100								20
								13374	98600								20
								57369	101500								20
								59956	102400								20
								55052	103300								20
							CAG	61215	110100								20
							NFK	78160	116500								20
								27996	117400								20
					11/18	11/19	NFK	76984	95600		32	29					19
								76856	100500								19
								13377	113200								19
								55032	99900								19
					11/19	11/20	BYE	27606	113300		31	28					18
							CNR	73561	115000								18
							NFK	51601	101900								18
					11/20	11/21	NYE	105581	111100		30	27	4		9		18
							NFK	4504	117500								18
							NFK	7813	127900								18
							NYE	77205	120800								18
							CNO	232371	113500								18
							NFK	55153	106700								18
					11/22	11/23		58963	97100		28	25					16
								5136	128900								16
								7752	114100								16
								7490	127700								16
								58916	107600								16
								7473	124500								16
								13774	76700								16
							NFK	78948	117000								16
							NYE	79512	114600								16
							NFK	79459	113100								16
								53518	115100								16
								8077	126200								16
								8426	126100								16
								7685	127600								16
										TOTALS	1911	1561	276	250	515	0	1049

SUMMARY

Total Days Debited . . . . . _____

Total Days Credited . . . . . _____

Balance Chargeable @ $1.00 Per Day . . . . . _____ Amount Due$ _____

E-J

C. T. 202
Revised 6-20-21

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of December, 1920

Consigned in name of Pier 6 for account of Emmanuel Cm Co Sheet No. 3

ACTUAL ORDER IN WHICH CARS WERE UNLOADED					ACTUAL ORDER IN WHICH CARS ARRIVED						DEMURRAGE						
CARS			UNLOADED INTO BOAT		CARS				Estimated Gross Weight (Demurrage Record)				DEDUCTION IN DAYS				
INITIALS	NUMBER	Date Unloaded	Name of Boat	"Date Assigned Per Rule 3 (a)"	Date Arrived	Date of Notice	INITIALS	NUMBER		Date Unloaded	Total Days Delay	TOTAL DAYS DETENTION (Subtract date Col. G from Col. E.)	Sundays and Legal Holidays	Free Time	TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
		12/20	Guernsey	12/18	11/22	11/29	NSR	56630	100800		28	25	4	5	9	0	16
							B+O	93487	105200								16
							PRR	194834	110800								16
							C+O	50181	99100								16
							B+O	127589	111400								16
					11/23	11/24	NSR	51892	101000		29	24					15
							C+O	74889	149500								15
							NSR	78643	107700								15
								74446	98600								15
								55109	100100								15
							PRR	158866	105900								15
							PRR	918040	117300								15
					11/24	11/25	PRR	258199	117500		26	23	0		8		15
					11/25	11/26	NSW	58146	101800		25	22					14
								54964	104800								14
								75905	96500								14
							PRR	166676	102600								14
							B+O	79955	111300								14
								79207	109400								14
					11/26	11/27	B&O	224879	104200		24	21					13
							C+O	60748	101200								13
							PRR	78947	117400								13
							NSW	80780	111000								13
					11/27	11/28	Erie	29458	104500		23	20	2		7		13
					11/29	11/30	PRR	204143	107400		21	18					11
							NSW	58904	102600								11
								8368	112300								11
								54241	98800								11
								53177	99400								11
								79021	111900								11
		11/30		12/1				80497	105800		20	17					10
							C+O	25191	102400								10
							NSW	59077	98000								10
								73235	96700								10
								7953	130300								10
		12/1		12/2				53961	102400		19	16					9
								75735	111200								9
								53691	98400								9
								8104	128300								9
								82219	126500								9
								85449	96500								9
							PRR	8296	71600								9
							NSW	84345	111300								9
							C+O	42980	110400								9
		12/4		12/5			NSW	7226	124900		16	13	1		6		7
							BRE	226597	113100								7
							NSW	79391	112500								7
							B+O	20128	98200								7
								123830	112300								7
							NSK	4970	124400								7
										TOTALS	1117	967	179	150	329	0	588

SUMMARY

Total Days Debited _____

Total Days Credited _____

Balance Chargeable @ $1.00 Per Day _____ Amount Due$ _____

C. T. 202
Revised 6-15-20

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of December, 1920

Consigned in name of Pier 6 for account of Inmount Coal Co Sheet No. 4

	ACTUAL ORDER IN WHICH CARS WERE UNLOADED					ACTUAL ORDER IN WHICH CARS ARRIVED							DEMURRAGE				
	INITIALS	NUMBER	Date Unloaded	UNLOADED INTO BOAT Name of Boat	UNLOADED INTO BOAT Gross Tons Per Boat Bill	Date Arrived	Date of Notice	INITIALS	NUMBER	Actual Gross Weight (Gross Tons Pounds)	Date Released	Total Days Delay	TOTAL DAYS DETENTION (Sundays and Holidays Excl. 24 Hours Free Time)	DEDUCTION IN DAYS Sundays and Holidays	DEDUCTION IN DAYS Free Time	DEDUCTION IN DAYS TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
1			12/20	[illegible]	24/15	12/5	12/6	NW	78314	110600		15	11	1	5	6	0	5
2								BRO	93133	119100								
3								NW	57886	100500								
4									57410	101100								
5								Norfolk	79099	115100								
6								NYE	96869	105000								
7								NW	57863	102100								
8									78990	97500								
9						12/5	12/5	[illegible]	[illegible]	24700		0	0	0	0	0	0	0
10						12/21	12/21	[illegible]	[illegible]	154400		0	0	0	0	0	0	0
11																		
12																		
13																		
14																		
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45																		
46																		
47																		
48																		
49																		
50																		
TOTALS												140	88	8 40	48	0	40	

SUMMARY
Total Days Debited . . . . . ———
Total Days Credited . . . . . ———
Balance Chargeable @ $1.00 Per Day . . . . . ——— Amount Due $———

E-5

C. T. 222
Revised 6-30-20

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of December, 1920

Consigned in name of Pool 7 for account of Emmons Coal Co Sheet No. 1

ACTUAL ORDER IN WHICH CARS WERE UNLOADED — CARS			UNLOADED INTO BOAT		ACTUAL ORDER IN WHICH CARS ARRIVED — CARS				Estimated Weight (actual)	Date Unloaded	DEMURRAGE					
INITIALS	NUMBER	Date Unloaded	Name of Boat	Date Released by Boat	Date Arrived	Date of Notice	INITIALS	NUMBER			Total Days Delay	TOTAL DAYS RETENTION (Inclusive date Col. E from Col. D)	DEDUCTION IN DAYS Sundays and Legal Holidays	Free Time	TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
		12/18	Thornhill	12/19	8/29	8/30	N&W	55178	94400	~~114~~		(Car Dept 1900)					
			Pier 500 Lbrs		✓	✓		7857✓	105800		104	(Not ret'd Car Dept 20 days to date)					
					8/30	8/31	WM	5896	92400		103	100	17	5	27✓	0	73
					9/17	9/18	C&O	40718	115100		85	87✓	15		20	0	67✓
					12/5	12/6	N&W	59204	100100		6	3	0		5	2✓	0
					✓	✓	N&W	38979	104500		6	3	0		5	2✓	0
					12/6	12/7	W&A	30180	100900		5	2✓	0		5	2	0
							N&W	80034	111800		5	2✓	0		5	3	0
								53134✓	100000		5	2✓	0		5	3	0
								54630	110700	~~12/28~~	5	2✓	0		5	3	0
	139600 lbs	12/17	Thornhill	12/17	12/6	12/7	N&W	121458	114300	~~114~~	5	2✓	0	5	5	3	0
	51500 lbs	12/17	Thornhill	12/17						$1000 $3500 2500		(demurrage charged as per above)					

TOTALS 744 198 3✓ 85 77 19 140

SUMMARY
(Tot.) Days Debited .....
(Total Days Credited .....
Balance Chargeable @ $1.00 Per Day ..... Amount Due$

E-4

EXHIBIT "E-1"

C. T. 202
Revised 5-30-08

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of December, 1920

Consigned in name of _____ for account of Emmanuel Coal Co Sheet No Total

ACTUAL ORDER IN WHICH CARS WERE UNLOADED						ACTUAL ORDER IN WHICH CARS ARRIVED						DEMURRAGE				
CARS			UNLOADED INTO BOAT			CARS						DEDUCTION IN DAYS				
INITIALS	NUMBER	Date Unloaded	Name of Boat	Tons Received Per Rule 3 (a)	Date Arrived	Date of Notice	INITIALS	NUMBER	Estimated Weight (Gross Tons)	Date Unloaded	Total Days Delay	TOTAL DAYS DETENTION (Between dates Col. G from Col. F.)	Sundays and Legal Holidays	Free Time	TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
	Recapitulation					Steel No			Coal								
		Pool No 5				1			22		170	109				30	13
		Pool No 6				1			2		181	99				0	52
						2			50		1911	561				0	1049
						3			50		1119	969				0	588
						4			8		120	88				0	40
								Total	110		3099	2698				0	1729
		Pool No 7				1			9		249	198				19	140

EXHIBIT "F"

C. T. 282
Revised 6-30-20

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of January, 1921

Consigned in name of Pool 5 for account of Emmons C M Co Sheet No. 1

ACTUAL ORDER IN WHICH CARS WERE UNLOADED						ACTUAL ORDER IN WHICH CARS ARRIVED					DEMURRAGE						
		CARS	UNLOADED INTO BOAT				CARS						DEDUCTION IN DAYS				
INITIALS	NUMBER	Date Unloaded	Name of Boat	Tons Received Per Rule 3 (a)	Date Arrived	Date of Notice	INITIALS	NUMBER	Actual Gross Weight (Gross Tons)	Date Unloaded	Total Days Delay	TOTAL DAYS DETENTION (Subtract date Col. G from Col. K)	Sundays and Legal Holidays	Free Time	TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
		1/4	B.O. Bloomer 505900	1/3	1/9	1/10	NKP	95918	96900	1/22/21		Sun Dec 1920					
								53749	100200		26	24	4	5	11	0	13
								81898	103600								13
								83696	107700								13
								20149	105100								13
								54687	97200	2/5/21							13
		1/10	Public Health Hospital 174000 lbs	1/10	1/10	1/11		99641	99800			Comm Local Demurrage					
				1	1/17	1/17	Dep from Pub Health		51000			" " "					

TOTALS 130 170 30 25 55 0 65

5 Cars

SUMMARY

Total Days Debited . . . . . _____

Total Days Credited . . . . . _____

Balance Chargeable @ $1.00 Per Day . . . . . _____ Amount Due $_____

F-1

C. T. 202
Revised 6-25-20

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of January, 1921

Consigned in name of Pool 7 for account of Eastman G M Co Sheet No. 1

ACTUAL ORDER IN WHICH CARS WERE UNLOADED					ACTUAL ORDER IN WHICH CARS ARRIVED						DEMURRAGE					
	CARS		UNLOADED INTO BOAT			CARS										
INITIALS	NUMBER	Date Unloaded	Name of Boat	Date Released from Note 3 (a)	Date Arrived	Date of Notice	INITIALS	NUMBER	Actual Estimated Weight (Gross Net) 2000	Date Unloaded	Total Days Per Diem	TOTAL DAYS DETENTION (Between dates Col. G from Col. E.)	DEDUCTION IN DAYS Sundays and Legal Holidays	Free Time	TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
		1/4	M	1/3	12/6	12/7	N&W	124458	114300	1/4							
		✓	Blompan	✓	✓	✓	N&W	7931	124600	1/4							
			740400							1/4	29	27	6	5	11	0	16

C. T. 208
Revised 6-30-30

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of January, 1921.

Consigned in name of Coal 7 for account of Tennessee B M Co Sheet No. 1

ACTUAL ORDER IN WHICH CARS WERE UNLOADED — CARS					ACTUAL ORDER IN WHICH CARS ARRIVED — CARS						DEMURRAGE					
INITIALS	NUMBER	Date Unloaded	UNLOADED INTO BOAT — Name of Boat	UNLOADED INTO BOAT — Tons Registered Per Rule 3 (a)	Date Arrived	Date of Notice	INITIALS	NUMBER	actual Marked Weight (Subject to Correction)	Date Unloaded	Total Days Delay	TOTAL DAYS DETENTION (Subject to Correction Col. C to Col. K)	DEDUCTION IN DAYS — Sundays and Legal Holidays	DEDUCTION IN DAYS — Free Time	DEDUCTION IN DAYS — TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
		1/4	Bloomgrove	1/3	13/6	17/7	NW	7674	127000		29	27	6	5	11	0	16
							"	73384	99500								16
							"	80374	131100								16
							"	84946	111100								16
							"	13090	78700								16
							"	60383	95900	31500							16
TOTALS											29	27	6	5	11	0	96

SUMMARY

Total Days Debited . . . . . _____

Total Days Credited . . . . . _____

Balance Chargeable @ $1.00 Per Day . . . . . _____ Amount Due$ _____

F-3

EXHIBIT "F-1."

C. T. 202
Revised 6-30-20

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of January, 1921

Consigned in name of _____ for account of Emmons C M Co Sheet No. Totals

ACTUAL ORDER IN WHICH CARS WERE UNLOADED					ACTUAL ORDER IN WHICH CARS ARRIVED						DEMURRAGE					
CARS			UNLOADED INTO BOAT		CARS											
INITIALS	NUMBER	Date Unloaded	Name of Boat	Date Received Alongside Pier	Date Arrived	Date of Notice	INITIALS	NUMBER	Estimated Weight (Gross) Tons	Date Unloaded	Total Days Delay	TOTAL DAYS DETENTION (Excess of Time Allowed Under Rule 6)	DEDUCTION IN DAYS Sundays and Legal Holidays	Free Time	TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
		Recapitulation			Pool No.				Cars								
		Pool No 5				1			5		130	140				0	65
		Pool No 7				1			1		29	29				0	16
						2			6		174	164				0	96
							Total		7		203	189				0	177

EXHIBIT "G"

C. T. No.

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of February, 1921

Consigned in name of Pool 5 for account of Emmons C M Co Sheet No. 1

ACTUAL ORDER IN WHICH CARS WERE UNLOADED					ACTUAL ORDER IN WHICH CARS ARRIVED							DEMURRAGE					
		CARS	UNLOADED INTO BOAT		CARS												
INITIALS	NUMBER	Date Unloaded	Name of Boat	No. Tons Coal or Net Tons Coke	Date Arrived	Date of Notice	INITIALS	NUMBER	Actual Estimated Weight (Shown by Bills)	Date Unloaded	Total Days Delay	TOTAL DAYS DETENTION (Record Cases Col. C from Col. E.)	DEDUCTION IN DAYS Sundays and Legal Holidays	Free Time	TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
1		2/4	Pollie Hall Hospital		1/17	1/17	Sp. from Ohio South	140100				(Free - Local Demurrage)					
2	30 [illegible]				1/27	1/28	N & W	58867	101600								
3		2/24	Ingram & Richardson Co 14400 lbs		1/27	1/28	N & W	76344	98300		58	65	10	5	15	0	40
4		✓	✓	✓	✓	✓	✓	50761	99900		58	65	10	5	15	0	40
5																	
6																	
7																	
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46																	
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50																	
TOTALS											117	110	20	10	30	0	80

2 Cars

SUMMARY

Total Days Debited . . . . . _____

Total Days Credited . . . . . _____

Balance Chargeable @ $1.00 Per Day . . . . . _____ Amount Due $_____

G

EXHIBIT "G-1."

C. T. 222
Revised 6-26-20

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of February, 1921

Consigned in name of _____ for account of Emmons & M Co. Sheet No. Totals

ACTUAL ORDER IN WHICH CARS WERE UNLOADED					ACTUAL ORDER IN WHICH CARS ARRIVED						DEMURRAGE					
CARS			UNLOADED INTO BOAT		CARS							DEDUCTION IN DAYS				
INITIALS	NUMBER	Date Unloaded	Name of Boat	Date Released Per Rule 3 (b)	Date Arrived	Date of Notice	INITIALS	NUMBER	Estimated Weight (Gross) (Tons)	Date Unloaded	Total Days Delay	TOTAL DAYS DETENTION (Subject to Rules Col. 2 from Col. 1)	Sunday and Legal Holidays	Free Time	TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
		Recapitulation			Short	No			6 cars								
		Obl No 5			1				7		114	110				0	80

EXHIBIT "H"

C. T. 102
Revised 6-26-20

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of March, 1921

Consigned in name of Pool 5 for account of Emmons C M Co. Sheet No. 1

ACTUAL ORDER IN WHICH CARS WERE UNLOADED — CARS					ACTUAL ORDER IN WHICH CARS ARRIVED — CARS						DEMURRAGE						
INITIALS	NUMBER	Date Unloaded	UNLOADED INTO BOAT — Name of Boat	Tons Registered Per Item 3 Art.	Date Arrived	Date of Notice	INITIALS	NUMBER	Actual Marked Capacity Weight (Gross Tons)	Date Unloaded	Total Days Delay	TOTAL DAYS DETENTION (Subtract date Col. G from Col. E.)	DEDUCTION IN DAYS — Sundays and Legal Holidays	DEDUCTION IN DAYS — Free Time	DEDUCTION IN DAYS — TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
		3/31	Ad Otis	3/30	1/27	1/28	N&W	54390	107600	3/22		See March Sheet No. 1					
			28 19900 lbs		1/29	1/30	C&E	41786	99300		92	90	16	5	21	0	69
					✓	✓	N&W	58358	97600							0	69
					✓	✓		74968	100100							0	69
					✓	✓	N&W	11006	110800							0	69
					✓	✓	N&W	57015	96000							0	69
					✓	✓	Aml	101184	96700							0	69
					✓	✓	✓	32496	103000							0	69
					✓	✓	N&W	49258	86700							0	69
					✓	✓	✓	91646	113700							0	69
					1/30	1/31	✓	51606	104800		91	89				0	68
					✓	✓	Erie	22435	102400							0	68
					✓	✓	N&W	7223	126600							0	68
					✓	✓	✓	54557	99700							0	68
					✓	✓	B&O E	6288	70600							0	68
					✓	✓	N&W	81388	107400							0	68
					✓	✓	✓	83798	99500							0	68
					✓	✓	✓	73004	99300							0	68
					✓	✓	✓	74588	98400							0	68
					✓	✓	✓	84670	96600							0	68
		1/31			1/31	1/1	✓	83231	106600		90	88	15		20	0	68
					✓	✓	✓	57988	94500							0	68
		✓			✓	✓	Erie	22376	104100							0	68
		1/1			1/1	1/2	N&W	86476	97400		89	87	14		19	0	68
		✓			✓	✓	✓	7021	112700		89	87				0	68
		1/3			1/3	1/4	C&O	54946	98600		87	86				0	67
		1/4			1/4	1/5	N&W	63726	98300		86	84				0	67
		✓			✓	✓	N&W	12408	96000		86	84				0	67
		1/5			1/5	1/5	Not from Coal Mines Company Dock		7300		0	0	0	0	0	0	0
		1/11			1/11	1/11	Empty Car		44300		0	0	0	0	0	0	0

C. T. 52
Revised 6-25-20

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of March, 1921

Consigned in name of Coal-7 for account of Emmons & McCarthy Sheet No. 1

ACTUAL ORDER IN WHICH CARS WERE UNLOADED — CARS					ACTUAL ORDER IN WHICH CARS ARRIVED — CARS							DEMURRAGE				
INITIALS	NUMBER	Date Unloaded	UNLOADED INTO BOAT: Name of Boat	UNLOADED INTO BOAT: Date Released (See Note 3 Below)	Date Arrived	Date of Notice	INITIALS	NUMBER	Net Weight (Deduct Tare)	Date Unloaded	Total Days Delay	TOTAL DAYS DETENTION (Between dates Col. C & E)	DEDUCTION IN DAYS: Sundays and Legal Holidays	DEDUCTION IN DAYS: Free Time	DEDUCTION IN DAYS: TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
		3/31	Ottawa 438700	3/30	17/6	17/7	N&W	60383	95900	11/22		Demurrage charges in January 1921					
					17/7	17/8	"	54416	101600		114	113	30	5	25	0	88

C. T. 102
Revised 6-30-20

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of March 1921

Consigned in name of Pool - 7 for account of Tennessee C M Co Sheet No. 2

ACTUAL ORDER IN WHICH CARS WERE UNLOADED — CARS					ACTUAL ORDER IN WHICH CARS ARRIVED — CARS						DEMURRAGE						
INITIALS	NUMBER	Date Unloaded	UNLOADED INTO BOAT Name of Boat	Tons Registered Per Reg. Book	Date Arrived	Date of Notice	INITIALS	NUMBER	Net Tons (Gross Tons X 2240) Weight	Date Un-loaded	Total Days Delay	TOTAL DAYS DETENTION (Between dates Col. F and Col. K)	DEDUCTION IN DAYS Sundays and Legal Holidays	DEDUCTION IN DAYS Free Time	DEDUCTION IN DAYS TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
		3/31	Ohio	3/30	1/8	1/9	NW	84053	116300		113	117	20	5	25	0	87
					"	"	MC	8967	96100		113	117	20	5	25	0	87
					3/11	3/11	[illegible]		26200		0	0	0	0	0	0	0
					3/4	3/4	[illegible]		24600		0	0	0	0	0	0	0
					6/1	6/1	[illegible]		14100		0	0	0	0	0	0	0
TOTALS											226	234	40	10.50	0	174	

SUMMARY

Total Days Debited - - - - - - - - - - - - - - - -

Total Days Credited - - - - - - - - - - - - - - - -

Balance Chargeable @ $1.50 Per Day - - - - - - - - Amount Due $

M-3

C. T. 202
Revised 6-25-20

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of March 1921

Consigned in name of Pool - 39 for account of Emmons Bm Co Sheet No. 1

ACTUAL ORDER IN WHICH CARS WERE UNLOADED — CARS					ACTUAL ORDER IN WHICH CARS ARRIVED — CARS								DEMURRAGE				
INITIALS	NUMBER	Date Unloaded	UNLOADED INTO BOAT: Name of Boat	UNLOADED INTO BOAT: Gross Registered Tons (See Note E)	Date Arrived	Date of Notice	INITIALS	NUMBER	Estimated Weight (Gross Tons)	Date Unloaded	Total Days Delay	TOTAL DAYS DETENTION (Subtract date Col. G from date Col. E)	DEDUCTION IN DAYS: Sundays and Legal Holidays	DEDUCTION IN DAYS: Free Time	DEDUCTION IN DAYS: TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
		3/31	Id Otsego 164280	3/30	9/4	9/15	GGRO	43510	118300	3/1500 / 3/1500	Demg.	chgd.	Sun.	Ord.	1920		
					✓	✓	✓	41311	118500		198	196	35	5	40	0	156
					✓	✓	✓	40371	115500								156
					✓	✓	PSMS	49539	96000								156
					✓	✓	CCRO	40641	123400								156
					9/15	9/16	✓	42026	118600		197	195					155
					✓	✓	✓	41049	115000								155
					✓	✓	✓	40559	114000								155
					✓	✓	Onw	93410	111000								155
					✓	✓	SRBX	80679	120000								155
					9/16	9/17	PRR	705426	103500		196	194					154
					✓	✓	CCRO	40073	116100								154
					✓	✓	PRR	11195	110000								154
					✓	✓	CCRO	42980	116800								154
					9/17	9/18	✓	41749	113000	7/1500 / 7/1500	195	193					153

TOTALS 3456 3478 490 30 660 0 3168

SUMMARY
Total Days Debited _____
Total Days Credited _____
Balance Chargeable @ $1.00 Per Day _____ Amount Due $_____

R-4

EXHIBIT "H-1."

C. T. 202
Revised 6-30-20

Norfolk & Western Railway Co.

Statement of Cars of Coal or Coke Handled at Norfolk and Lambert's Point Piers

During the month of March 1921

Consigned in name of

for account of Emmons C M Co, Sheet No. Totals

ACTUAL ORDER IN WHICH CARS WERE UNLOADED — CARS			UNLOADED INTO BOAT		ACTUAL ORDER IN WHICH CARS ARRIVED — CARS					DEMURRAGE				
INITIALS	NUMBER	Date Unloaded	Name of Boat	"Coals Registered Per Rule 7 (a)"	Date Arrived	Date of Notice	INITIALS	NUMBER	Estimated Weight (Gross Tons)	Date Unloaded	Total Days Delay	TOTAL DAYS DETENTION (Between dates Col. D Incl. & Col. E.)	DEDUCTION IN DAYS: Sundays and Legal Holidays	DEDUCTION IN DAYS: Free Time	DEDUCTION IN DAYS: TOTAL	NET DAYS CREDIT	NET DAYS DEBIT
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
		Recapitulation			Heat	No			Coal								
		Pool No 5				2			27		2445	2391				0	1837
		Pool No 7				1			1		114	113				0	88
						2			2		226	224				0	174
							Total		3		340	337				0	262
		Pool No 39				1			14		2756	2728				0	2168

44 TOTALS 5541 5456 4267

SUMMARY		
	Total Days Debited	4267
	Total Days Credited	0
	Balance Chargeable @ $1.00 Per Day	4267 Amount Due $ 8534.00
		Mar Int @ 3% 256.02
		$ 8790.02

H-A

EXHIBIT "I."

TIDEWATER DEMURRAGE.

September, 1920,	$2,114.00
October, 1920,	1,028.00
December, 1920, $3,666 demurrage + a 3% War Tax of $109.98 =	3,775.98
January, 1921, $354.00 demurrage + a 3% War Tax of $10.62 =	364.62
February, 1921, $160.00 demurrage + a 3% War Tax of $4.80 =	164.80
March, 1921, $8,534.00 demurrage + a 3% War Tax of $256.02 =	8,790.02
Total,	$16,237.42

EXHIBIT "K."

(Copy)

It is understood that, Before Signing, Principals and Sureties Have Carefully Read this Bond.

KNOW ALL MEN BY THESE PRESENTS, That we EMMONS COAL MINING COMPANY, hereinafter styled "Principals" (trading as SAME and having a principal office at Land Title Building, Philadelphia, Pa.) and

(*Names of Sureties*)	(*Addresses*)
THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,	92 Liberty St., New York, New York,

Sureties (all of the above-named hereinafter styled collectively "Obligors") are held and firmly bound unto the NORFOLK AND WESTERN RAILWAY COMPANY, hereinafter styled "Railway Company" in the sum of

TEN THOUSAND ($10,000.00) dollars, lawful money of the United States, to be paid to the Railway Company, to which payment well and truly to be made we bind ourselves jointly and severally, our and each of our heirs, executors, administrators, successors and assigns, firmly by these present.

Sealed with our seals. Dated the twenty-eighth day of May nineteen hundred and twenty (1920).

THE CONDITION OF THIS OBLIGATION is such that:

WHEREAS, the Principals, as consignees or as shippers, desire and request the Railway Company to deliver to them or their representatives or to receive from them and forward, without previous full payment of the amounts payable thereupon by them, articles receivable by them from the Railway Company or shipped by them as prepaid at Norfolk, Va. or elsewhere soever and to extend to them the privilege of periodical payment, reserving to the Railway Company the sole right to decide if, when, and to what extent the Principals shall enjoy the privileges herein applied for;

AND WHEREAS, in consideration of the privileges they may enjoy hereunder, the principals have agreed and hereby do agree:

(1) To pay all amounts collectible from them on the said articles (including freight, demurrage, storage, and all other similar charges) when and as the Railway Company or its agents shall from time to time demand, or in the absence of demand, on presentation of daily sight drafts and without reservation for alleged setoffs, overcharges or other cause whatever.

(2) To reserve to and vest in the Railway Company a lien on any and all articles shipped hereafter to and by the Principals, or any of them, or belonging

to them, and on any and all other of their goods, moneys and accounts hereafter in the care or custody of the Railway Company for all general freight balances, demurrage, storage, or other similar charges at any time hereafter unpaid, with the right, to be exercised at its option in default of payment hereunder, to withhold from delivery or shipment, and to hold as security until payment shall have been fully made hereunder, any and all such articles, goods, moneys and accounts then or later in the care or custody of the Railway Company, and to sell the same, or any part or parts thereof, at any time or times or place or places, with or without legal process and without notice to the Principals or other notice whatever, but at public sale, to the highest bidder for cash, and after deducting expenses thereby incurred to apply the net proceeds thereof and the moneys and accounts on hand as far as shall be necessary to make good any default hereunder.

(3) To indemnify and save harmless the Railway Company against any and all claims, loss and damage arising out of such retention and sale or otherwise hereunder;

THEREFORE, if the Principals shall fully pay the Railway Company and indemnify it as aforesaid, then this obligation shall be void, but otherwise shall remain in full force and effect.

IT IS UNDERSTOOD AND AGREED, BY AND BETWEEN ALL THE PARTIES HERETO, (1) That, except as to transactions prior to such termination and except as to liability incurred by the Obligors or any of them hereunder, this obligation may be terminated by thirty days' written notice of intention so to terminate given by the Obligors or any of them to the Railway Company at the office of its treasurer.

(2) That in case the Railway Company shall from time to time at its own option, accept from the Principals checks, drafts, notes or other obligations or instruments, the obligors, as part of their obligation hereunder, guarantee the payment thereof in cash when presented at the place of payment therefor; the acceptance thereof by the Railway Company shall not operate as payment nor shall the sureties be discharged nor this obligation be terminated while any thereof is outstanding and unpaid.

And (3) That the Railway Company may extend the time or times for payment hereunder and that omission or delay on its part to notify the sureties of any extension of time or of any failure of the Principals to make payments hereunder shall not operate to relieve the sureties from liability; the sureties jointly and severally hereby agree that the Railway Company shall have at least three months to notify them of failure of the Principals to make payments as aforesaid.

(SIGNATURES AND ADDRESSES OF WITNESSES)

Sealed and delivered in the presence of:

H. E. FOULKROD,
810 Land Title Bldg.,
Phila.

E. B. CLARK,
1813 N. Bouvier St.,
Phila., Pa.

ALFONSO COBELLO,
1934 Morris St.,
Phila., Pa.

(SIGNATURES OF PRINCIPALS AND SURETIES)

EMMONS COAL MINING COMPANY,
J. G. EMMONS,
Sec.-Treasurer. (Seal)

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,
By W. SION RING,
Attorney. (Seal)

COUNTERSIGNED.
By H. NESBITT,
at Richmond, Va. (Seal)

AFFIDAVIT OF DEFENSE RAISING QUESTIONS OF LAW.

(Filed February 6, 1922.)

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *ss.:*

J. G. EMMONS, being duly sworn according to law, deposes and says that he is secretary and treasurer of EMMONS COAL MINING COMPANY, one of the above-named corporations, defendant; that he is duly authorized to make this affidavit on its behalf; that he is specially informed as to the facts hereinafter set forth; and that the said corporation has a full, just, true and legal defense to the whole of the plaintiff's said claim, as follows:

Deponent has consulted counsel, is informed and believes and therefore avers:

1. That it appears from the said statement of claim that this proceeding is one brought by a carrier engaged in interstate commerce to collect upon interstate shipments certain charges made by the carrier, based upon a construction and interpretation placed by the carrier upon certain rules and regulations, to wit, Articles of Organization and Rules of the Lamberts Point Coal Exchange, which are not alleged to have been and were not filed with the Interstate Commerce Commission and published as required by the Interstate Commerce Act, as supplemented and amended, and that such charges are illegal and non-enforceable.

2. That it appears from the said statement of claim that this proceeding is one brought by a carrier engaged in interstate commerce to collect upon interstate shipments certain charges made by the carrier, based upon certain rules and regulations, to wit, Arti-

cles of Organization and Rules of the Lamberts Point Coal Exchange, which are not alleged to have been and were not filed with the Interstate Commerce Commission and published as required by the Interstate Commerce Act, as supplemented and amended, and that such charges are illegal and nonenforceable.

3. That it appears from the matters contained in the statement of claim and the exhibits thereto attached that this action is one which fundamentally and necessarily involves and is dependent upon the decision of a question which under the provisions of the Interstate Commerce Act of the United States is exclusively one for the determination of the Interstate Commerce Commission, namely, the reasonableness of a charge for services made by the carrier in respect to an interstate shipment, and that therefore this court is without jurisdiction to determine this cause.

Deponent respectfully suggests that this court should take judicial notice of the fact that a proceeding has been duly docketed on November 16, 1920, and is now pending before the Interstate Commerce Commission, to wit, Smokeless Fuel Company, *et al.* v. Norfolk & Western Railway Company, Docket No. 13281, wherein the question of the propriety and reasonableness of the said charge will be determined, and that this court should not assume or entertain any jurisdiction in this action, or permit the same to be further proceeded with, until said proceedings before the said Interstate Commerce Commission shall have been determined, and its decision announced.

A true and correct copy of the papers filed in said proceedings are hereto attached and marked Exhibit "A."

4. That it appears from the statement of claim that the charges sought to be enforced against the

defendant, Emmons Coal Mining Company, are based upon an interpretation made by the railroad of the rules and regulations regarding the assessment of demurrage charges as set forth in its demurrage tariff; that said tariff rules and regulations are susceptible of an interpretation other than the interpretation placed upon them by the railroad and that the reasonableness of the interpretation placed thereon by the railroad is within the exclusive jurisdiction of the Interstate Commerce Commission to determine because such interpretation involves the reasonableness of a charge for services made by the carrier in respect to interstate shipments of freight, and that therefore this court is without jurisdiction to determine this cause.

In this connection, defendant respectfully suggests that this court should take judicial notice of the fact that a proceeding has been duly docketed on November 16, 1921, and is now pending before the Interstate Commerce Commission, to wit: Smokeless Fuel Company, *et al.* v. Norfolk & Western Railway Company, Docket No. 13281, wherein the question of the propriety and reasonableness of the application of the demurrage rules and regulations and the charge based thereon as assessed by the railroad will be determined, and that this court should not assume nor entertain any jurisdiction in this action, or permit the same to be further proceeded with, until said proceedings before said Interstate Commerce Commission shall have been determined and its decision therein announced. A true and correct copy of the papers filed in that proceeding are hereto attached and marked Exhibit "A."

5. That it appears from the statement of claim filed herein that this proceeding is one to enforce the collection of a tariff which is illegal in that, contrary to the laws of the United States, the same has not been filed with the Interstate Commerce Commission and published.

6. In that it appears from the statement of claim that the charges sought to be enforced against the defendant are assessed by the plaintiff under plaintiff's interpretation of certain Articles of Organization and Rules of the Lamberts Point Coal Exchange, which were not, and are not alleged to have been, filed with the Interstate Commerce Commission and published as required by the Statutes of the United States.

7. That it appears from the statement of claim that the plaintiff seeks to hold the defendant, the Emmons Coal Mining Company, liable for a claim, which, if existent at all, can only be legally enforced against the Lamberts Point Coal Exchange, and which is not legally enforceable against said defendant.

8. In that this proceeding is one wherein the carrier charges, demands, and seeks to collect a greater and different compensation for services in connection with the interstate transportation of property as defined in the Interstate Commerce Act than that specified in the tariff filed and in effect at the time, as forbidden by Section 6 of the said act as amended (24 Stat. L. 381, as amended by 25 Stat. L. 856, 34 Stat. L. 587).

9. That it appears from the statement of claim and the exhibits thereto attached that this action is one wherein the carrier has charged, demands and seeks to collect a different and greater compensation for services in connection with the interstate transportation of property as defined in the Interstate Commerce Act than that applicable under a reasonable interpretation of the rules and regulations of its demurrage tariff on file with the Interstate Commerce Commission and in effect at the time, appearing as Exhibit "A" to the statement of claim, in violation of Section 6 of the said act (41 Statute at Large, 474) and such

different and greater compensation is illegal and non-enforceable.

10. That it appears from the statement of claim herein that said pleading is not sufficient in its allegation to state a cause of action or basis of claim against the defendant, the Emmons Coal Mining Company, in that the statement of claim simply alleges the conclusion of fact that the coal company failed to dispose of the coal so consigned to it within the free time provided by the tariff, but fails to allege the facts to support this conclusion in that the Exhibits "C" to "H," inclusive, purporting to support such conclusion of fact fail to show car number and initial of each car consigned to the Emmons Coal Mining Company, or rather consigned to the Exchange for its account, with the date upon which notice of arrival was sent to the Emmons Coal Mining Company, and the date upon which each of said cars was actually unloaded, or do said exhibits show whether the said cars, if not actually unloaded before the expiration of the five days period of free time, were held in the yards for the convenience of the said railroad to avoid switching as indicated by the allegations of the statement of claim as set forth in Note B-2 of Rule 3 of its demurrage tariff filed as Exhibit "A" and made a part of the statement of claim.

11. Deponent further respectfully suggests that a proceeding has been duly docketed and is now pending before the Interstate Commerce Commission, to wit, Smokeless Fuel Company, *et al.* v. Norfolk & Western Railway Company, Docket No. 13281.

That in said proceeding the question of the propriety of the assessment of demurrage on export coal at the Lamberts Point coal piers by this plaintiff against this defendant and others, including the de-

murrage here sought to be collected, both as to its legality and reasonableness, will be determined; that the legality and reasonableness of these charges is exclusively within the jurisdiction of the said Interstate Commerce Commission, whose prior decision upon said questions is therefore necessary to a decision in this case.

Deponent therefore respectfully suggests to this Honorable Court that it should take judicial notice of said proceedings before the said Interstate Commerce Commission and should not assume or entertain any jurisdiction in this action, or permit the same to be further proceeded with until said proceedings before the said Interstate Commerce Commission shall have been determined and its decision announced.

12. Defendant expressly reserves its right under the Practice Act of 1915 of the State of Pennsylvania and the Local Conformity Acts to file an affidavit of defense on the merits to the plaintiff's claim, in the event that the questions of law raised herein shall be determined adversely to the defendant's contentions.

WHEREFORE, deponent denies that the said defendant Emmons Coal Mining Company, is indebted to the plaintiff in any sum whatsoever.

Sworn to and subscribed before me this 4th day of February, A. D. 1922. } (Sgd.) J. G. EMMONS.

HOWARD E. FOULKROD,
(Seal) *Notary Public.*
My commission expires March 7, 1925.

GIBBS L. BAKER,
KARL KNOX GARTNER,
CONLEN, BRINTON & ACKER,
Attorneys for Defendant.

EXHIBIT "A."

BEFORE THE
INTERSTATE COMMERCE COMMISSION.

No. 13281.

Smokeless Fuel Company,
Castner, Curran & Bullitt, Inc.,
Cory Mann George Corporation,
Cosgrove & Wynkoop Coal Company, Inc.,
Dexter & Carpenter, Inc.,
Emmons Coal Mining Company,
Fort Dearborn Coal & Export Company, Inc.,
Hasler & Company, Inc.,
Jewett, Bigelow & Brooks,
Kentenia Coal Company, Inc.,
Lake & Export Coal Corporation,
W. A. Marshall & Company,
Matlack Coal & Iron Corporation,
Nottingham & Wrenn Company,
Pan-Handle Coal Company,
Raleigh Smokeless Fuel Company,
C. H. Sprague & Son Company,
Virginia Smokeless Coal Company,
George E. Warren Corporation,
Weston Dodson & Company, Inc.,
West Virginia Coal Company, Inc.,
Complainants,

vs.

Norfolk & Western Railway Company,
Defendant.

COMPLAINT.

For complaint herein the above named complainants respectfully show:

I.

That the complainants named in the caption, and each of them ship coal in interstate commerce via the defendant, Norfolk & Western Railway, to Lamberts Point, Virginia, the tidewater coal piers of the defendant. That the complainant, Smokeless Fuel Company, is a corporation authorized to sue and be sued and otherwise to engage in the business of mining and marketing coal under and by virtue of the laws of the State of West Virginia, with its principal office located at Charleston, West Virginia; that the complainant, Castern, Curran & Bullitt, Incorporated, is a corporation authorized to engage in the business of mining and marketing coal under and by virtue of the laws of the State of Delaware, with its principal office located at New York, N. Y.; that the complainant, Cory Mann George Corporation, is a corporation authorized to engage in the business of mining and marketing coal under and by virtue of the laws of the State of New York, with its principal office located at New York, New York; that the complainant, Cosgrove and Wynkoop Coal Company, Incorporated, is a corporation authorized to engage in the business of mining and marketing coal under and by virtue of the laws of the State of New York, with its principal office located at New York, New York; that the complainant, Dexter and Carpenter, Incorporated, is a corporation authorized to engage in the business of mining and marketing coal under and by virtue of the laws of the State of Delaware, with its principal office located at New York, New York; Emmons Coal Mining Company, Incorporated, is a corporation authorized to engage in the business of mining and marketing coal under and by virtue of the laws of the State of Pennsylvania, with its principal office located at Phila-

delphia, Penna.; that the complainant, Fort Dearborn Coal & Export Company, Incorporated, is a corporation authorized to engage in the business of mining and marketing coal under and by virtue of the laws of the State of Delaware, with its principal office located at Norfolk, Virginia; that the complainant, Hasler & Company, Incorporated, is a corporation authorized to engage in the business of mining and marketing coal under and by virtue of the laws of the State of Virginia, with its principal office located at Norfolk, Virginia; that the complainant, Jewett, Bigelow and Brooks, is a corporation authorized to engage in the business of mining and marketing coal under and by virtue of the laws of the State of Michigan, with its principal office located at Detroit, Michigan; that the complainant, Kentenia Coal Company, Incorporated, is a corporation authorized to engage in the business of mining and marketing coal under and by virtue of the laws of the State of Kentucky, with its principal office located at Cincinnati, Ohio; that the complainant, Lake & Export Coal Corporation, is a corporation authorized to engage in the business of mining and marketing coal under and by virtue of the laws of the State of West Virginia, with its principal office located at Huntington, West Virginia; that the complainant, W. A. Marshall & Company, is a corporation authorized to engage in the business of mining and marketing coal under and by virtue of the laws of the State of New York, with its principal office located at New York, New York; that the complainant, Matlack Coal and Iron Corporation, is a corporation authorized to engage in the business of mining and marketing coal under and by virtue of the laws of the State of New York, with its principal office located at New York, New York; that the complainant, The Nottingham & Wrenn Company, is a corporation authorized to en-

gage in the business of mining and marketing coal under and by virtue of the laws of the State of Virginia, with its principal office located at Norfolk, Virginia; that the complainant, Pan-Handle Coal Company, is a partnership, composed of Paul L. James and W. W. Houston, partners, engaged in the business of mining and marketing coal, with their principal office located at Norfolk, Virginia; that the complainant, Raleigh Smokeless Fuel Company, is a corporation authorized to engage in the business of mining and marketing coal under and by virtue of the laws of the State of West Virginia, with its principal office located at Beckley, West Virginia; that the complainant, C. H. Sprague & Son Company, is a corporation authorized to engage in the business of mining and marketing coal under and by virtue of the laws of the State of Maine, with its principal office located at Boston, Mass.; that the complainant, Virginia Smokeless Coal Company, is a partnership, composed of George W. St. Clair, Thomas H. Settle, Robert H. Moore and Huston St. Clair, partners, engaged in the business of mining and marketing coal, with their principal office located at Tazewell, Virginia; that the complainant, George E. Warren Corporation, is a corporation authorized to engage in the business of mining and marketing coal under and by virtue of the laws of the State of Massachusetts, with its principal office located at Boston, Mass.; that the complainant, Weston Dodson & Company, Incorporated, is a corporation authorized to engage in the business of mining and marketing coal under and by virtue of the laws of the State of Pennsylvania, with its principal office located at Bethlehem, Penna.; and, that the complainant, The West Virginia Coal Company, Incorporated, is a corporation authorized to engage in the business of min-

ing and marketing coal under and by virtue of the laws of the State of Virginia, with its principal office located at Richmond, Virginia.

II.

That the defendant, Norfolk & Western Railway Company, is a common carrier and as such is engaged in the transportation of coal interstate to its piers at Lamberts Point for these complainants and for other shippers, similarly situated, and that as such common carrier, it is subject to the provisions of the Interstate Commerce Act.

III.

That the Norfolk & Western Railway by its tariff effective July 1, 1920, designated as I. C. C. 2828-B publishes its rules and regulations for the assessment of demurrage on cars containing coal for trans-shipment by vessels at Norfolk and Lamberts Point, Virginia. That under Rule 2 of the said tariff an average of five days per car free time is allowed on coal. That Rule 4 providing for the assessment of demurrage charges is in terms as follows:

> "Settlement shall be made on the basis of detention to all cars released during the month. The date of arrival notice shall be subtracted from the date of release. From the total days detention to all cars thus obtained, deduct all Sundays and legal holidays, following the date of arrival and five (5) days free time allowance for each car, except on cars containing coke for export deduct ten (10) days free time allowance for each car; the remainder, if any, will be the number of days to be charged at the rate of $2.00 per car per day. Excess credit days of any one month cannot be deducted from the excess debit days of another month."

That the release of a particular car as referred to by Rule 4 is determined by Rule 3 paragraph (b) which is in terms as follows:

"(b) A car shall be considered as released:

1. At the time vessel registers for the cargo or fuel supply of which the coal, coal briquets or coke dumped into such vessel is a part, except that when cars are unloaded before the vessel registers such cars shall be released when unloaded.

2. To avoid delay that would be entailed in switching out and delivering on shipper's order, in actual sequence of arrival, cars containing the same grade of coal, as indicated by the identifying consigning names or numbers on the way-bills, the dates on which cars should have been so released (as indicated by the record) will be substituted for the dates on which equivalent tonnage was actually delivered and the detention will be computed on the basis of such substituted dates.

3. The dates shipments are transferred by written order and acceptance to another party shall be considered the date of release of the car for the account of the original consignee and subsequent detention shall be charged in the account of the new consignee without any free time allowance.

4. Any fraction of a day will be computed as one day."

IV.

That the complainants and each of them since January 1, 1920, the effective date of said demurrage tariff, have made numerous shipments of coal to the tidewater coal piers of the defendant located at Lamberts Point for trans-shipment by vessel. That the defendant has assessed demurrage charges in connec-

tion with such shipments contrary to the provisions of its said tariff in that it has not properly accounted to said complainants or given said complainants the benefit of five days free time upon each car handled for them at said coal piers and in that the demurrage bills assessed have been predicated upon a constructive detention of cars regardless of the provisions of the tariff fixing the time when the said cars shall be deemed under the tariff to have been released and freed from further accruals of demurrage and that said demurrage charges are accordingly unlawful in violation of Section VI of the Interstate Commerce Act.

V.

That under the rules prescribed by the defendant which however are not made a part of its tariff, the said defendant required the coal shipped by complainants to its tidewater coal piers to be billed to the complainants hereto in care of a certain Lamberts Point Coal Exchange. That the complainants were required by the defendant to execute to it a blanket order under which the said Lamberts Point Coal Exchange was given possession of and full control over the actual coal so consigned. That pursuant to said requirements made by the defendant in connection with the said shipments to its said tidewater piers at Lamberts Point, the manager of the said Lamberts Point Coal Exchange took possession of and exercised all authority and control over, all of said shipments and that the complainants herein never had the possession of nor exercised the control over, in any respect whatsoever, of the coal shipped to said piers under the requirements of the defendant. That the requirements mentioned constituted a re-consignment to the Lamberts Point Coal Exchange of the coal involved, shipped to

said piers by complainants, and that in fact as well as in law the Lamberts Point Coal Exchange under said requirements was and is the common consignee of all coal shipped by the complainants herein to said piers during all the period from July 1, 1920, to the filing of this complaint.

VI.

That the Lamberts Point Coal Exchange is an entity separate and distinct from the defendant, not incorporated, however, yet created by it as vouchsafed by the preamble of its Articles of organization and Rules for the purpose of meeting "the suggestions and to aid in accomplishing the purposes of the Interstate Commerce Commission in its endeavors to improve transportation service." That said Articles of Organization and Rules under Rule 3 provides that the defendant, Norfolk & Western Railway, will appoint a manager to administer the affairs of the Exchange whose salary and the expenses of whose office together with the expenses of coal inspection, it will pay. That a shipper desiring to avail himself of this railway agency so set up by the defendant, is required by these rules to apply for "membership" on Exchange Form A, a copy of which is appended hereto as Exhibit A, and made a part hereof, which besides being an application for membership is an offer on the part of the shipper to sign Exchange Form B, a copy of which is appended hereto as Exhibit B, and made a part hereof. That Exchange Form B besides being a blanket reconsignment to the Exchange by the shipper of all coal to be shipped through the Exchange, purports to be an agreement to pay "any car demurrage accruals under the tariff of the railway company, car days detention to be computed by subtracting the date of arrival of cars shipped for account of the undersigned from the date of release of equivalent cars."

That in order to avail themselves of the transportation facility thus created under advice and direction from the Interstate Commerce Commission as stated in said Articles of Organization, the complainants, and each of them signed Exchange Forms A and B. That said Exchange Forms A and B did not constitute a valid and binding contract agreement upon complainants as between themselves and the defendant railway in so far as they concern the payment of demurrage or any other transportation charges, because there is a total lack of any consideration, valuable or otherwise, passing from said defendant railway to these complainants to support their undertaking with respect of demurrage as before quoted. That even if these forms signed by complainants could be held to constitute valid and binding agreements concerning the payment of demurrage charges, they would then constitute a contract concerning transportation charges and since neither these forms nor the Articles of Organization and Rules are filed with the Commission as a part of the defendant's tariff, these contracts if they be contracts in so far as they provide for transportation charges which vary from these applicable under the filed tariffs of the defendant, are absolutely null and void and of no effect in so far as supporting a claim for demurrage charges other than the charges lawfully accruing under said demurrage tariff. A copy of the Articles of Organization and Rules of the Lamberts Point Coal Exchange is appended hereto as Exhibit C and made a part hereof.

VII.

That demurrage can lawfully accrue only for the actual detention of cars loaded with coal after same has been delivered to the consignee against whom the demurrage charges are attempted to be assessed. That

delivery to the Lamberts Point Coal Exchange under the re-consigning order constituted by Form B is not in law a delivery to these complainants for the purposes of the assessment of demurrage. That if the Lamberts Point Coal Exchange under the Lamberts Point Coal Exchange arrangement is held to be the common consignee under an agency growing out of said arrangement existing between said Exchange and the complainants as "members" thereof, the, that only so much demurrage may be assessed against each of the complainants as would be represented by its proportionate part of the demurrage assessable against such Exchange as common consignee as such members actual detention bore to the total detention determined by the monthly settlement as provided for in defendant's tariff.

VIII.

That demurrage is a lawful transportation charge only in so far as it is based upon an actual detention of railroad equipment. That if the tariff rules of this defendant do provide for the assessment of demurrage charges which are not based upon an actual detention of the defendant's equipment caused by the complainants, then and to the extent such tariff rules provide for the assessment of such unlawful demurrage they are unjust and unreasonable in violation of Section I of the Interstate Commerce Act.

IX.

That said unlawful demurrage charges have in part been paid and in part have been assessed against the complainants in the form of bills presented by the defendant which bills these complainants rightfully refuse to pay until they are reformed so as to comply with the published tariff of said defendant. As to so much of the demurrage charges as have been paid, the complainants herein allege that they are entitled

to reparation from this defendant to the extent that the charges paid exceeded the charges that would have accrued had they been based upon said tariff and here seek a reparation award from this Commission to such extent. As to so much of the demurrage charges as have been assessed by the defendant, Norfolk & Western Railway Company, which are held in suspense on bills rendered, in so far as said demurrage charges are not based upon said tariff, the complainants herein pray the order of this Commission relieving them from the payment thereof in so far as they exceed the charges which should accrue based upon said tariff. That the records from which it can be determined to what extent the demurrage charges paid and billed exceed the lawful charges are in the possession of the defendant and for this reason the complainants are unable to furnish a statement of the charges that should have been paid. That the amounts of demurrage charges that have been paid by each of the complainants is already known to the defendant from their records and that the amounts assessed against each of said complainants on bills outstanding is likewise known.

WHEREFORE, the complainants pray that the defendant be required to answer and that this Commission will enter upon an investigation of the lawfulness of the demurrage charges assessed as alleged; that the Commission will construe defendant's tariff and determine whether the demurrage charges assessed and paid have been applied in accordance therewith; that if it be found that said charges have been assessed in accordance with the tariff rules that then the Commission will require said rules to be amended so that same will be just and reasonable and that demurrage will be assessable only upon cars actually detained and full account taken of all credit days accruing on all

cars at the rate of five free days per car during the month covered by the settlement as provided for in the tariff, by applying any excess credits against cars standing at the end of such month advancing the arrival date of such cars accordingly; that the complainants who have paid demurrage charges will be awarded reparation for any excess paid over and above the charges that would have accrued as may be found just and reasonable with leave to file a Rule V Statement and that the complainants may be relieved of paying any demurrage assessed on outstanding bill in excess of such charges and that such other and further relief may be ordered as the complainants may appear to be entitled.

Dated at Washington, October 26, 1921.

KARL KNOX GARTNER,
Attorney for Complainants,
701-6 Woodward Building,
Washington, D. C.

OF COUNSEL:
GIBBS L. BAKER, ESQUIRE.

EXHIBIT "A."

Form A

LAMBERTS POINT COAL EXCHANGE

AGREEMENT

Dated at .....192....

To.....
Manager, Lamerts Point Coal Exchange,
Norfolk, Virginia.

Dear Sir:

Application is hereby made for membership in the Lamberts Point Coal Exchange, and the under-

signed if accepted, agrees to the handling of his (or its) coal in conformity with regulations governing the Exchange, and will upon notification sign and deliver Exchange Form "B."

References are submitted herewith to be passed upon by the Executive Committee.

.....

By.....

EXHIBIT "B."

Form B

LAMBERTS POINT COAL EXCHANGE

AGREEMENT

Dated at .....192....

To.....

.....RR

.....

Dear Sir:

Until further notice the Norfolk & Western Railway is hereby authorized to accept from the Manager of the Lamberts Point Coal Exchange his orders for delivery of any coal consigned for account of the undersigned in care of the Lamberts Point Coal Exchange.

I (or we) hereby agree to pay freight charges (when waybilled collect), and vessel loading charges on coal unloaded into vessels for my (or our) account on orders executed by the Manager of the Lamberts

Point Coal Exchange, provided that bills for freight charges shall be so adjusted that they will not exceed the rates applicable on coal shipped to the piers for my (or our) account. The undersigned further agrees to pay any car demurrage accruals under the tariff of the Railway Company, (car days detention to be computed by subtracting the date of arrival of cars shipped for account of the undersigned from the date of release of equivalent cars.)

.....
(Name of Exchange Member)

By.....

EXHIBIT "C."

ARTICLES OF ORGANIZATION AND RULES OF THE LAMBERTS POINT COAL EXCHANGE

Articles of Organization and Rules of the Lamberts Point Coal Exchange

1. Name. The name of the organization is the Lamberts Point Coal Exchange. Besides its object as set out below, it is established as a measure to meet the suggestions and to aid in accomplishing the purposes of the Interstate Commerce Commission in its endeavors to improve transportation service.

2. Object. The organization of the Lamberts Point Coal Exchange is for the purpose of reducing coal classifications and necessary switching thereof; and to facilitate dumping, thereby expediting the despatch of vessels and augmenting car supply at the mines; and is to (a) Act as an Agency for the Pooling of coal, and to execute to the Norfolk & Western Railway Company orders of the members for delivery of tonnage to vessels; permitting the use by a shipper of coal of the same pool to which the member has made shipments, and to the extent of such contributions, without being required to apply on the delivery order of a member the identical coal consigned to him; and (b) To maintain a complete record of all shipments of coal consigned by the members in the various classifications and of orders received from members and executed to the Railway Company covering delivery of coal to vessels.

3. To accomplish the above-mentioned object the Norfolk & Western Railway agrees to appoint a Manager to administer the affairs of the Exchange, and to pay his salary and expenses of his office, and to defray expense of coal inspection as referred to in Article 13.

4. Membership. A shipper or consignee of Tidewater coal moving over the Lamberts Point piers of the N. & W. Railway, may become a member of the Exchange by (a) Furnishing references which meet the approval of the Executive Committee; (b) Subscribing to agreements providing for the handling of his (or its) coal in conformity with regulations governing the Exchange; and (c) Conditioned upon receipt of notice by the Manager of the Exchange from the Railway Company that the applicant has furnished to the Railway Company a bond to cover car demurrage and other lawful charges, and has presented to it satisfying evidence of ability to furnish vessels promptly upon assembling of cargoes.

5. Regulation of Shipments. The right to regulate shipments of coal in care of the Exchange is recognized as a railroad function, and the exercise of this prerogative by the Railway Company will be through its Transportation Department, and the available vessel supply of a member together with the railroad transportation conditions will govern the acceptance of shipments by the Railway Company. Members, therefore, must furnish direct to the Railway Company information required as to vessel tonnage and expected arrival thereof.

6. Delivery Orders. The Exchange will neither record nor take cognizance of sales of tonnage between members, and, as to disposition of coal once in a pool, will only execute orders of a member which call for delivery of tonnage to a vessel or for reconsignment by rail to a consuming consignee or retail dealer. (See Rules 14 and 26.)

7. Executive Committee. An Executive Committee consisting of seven members shall be formed in the following manner: One appointed by the Railway Com-

pany, the Manager of the Exchange as member ex officio, two members from the Pocahontas District and one from each the Tug River, Thacker and Clinch Valley Districts to be elected by the membership at each annual meeting.

8. Annual Meeting. The annual meeting of the Lamberts Point Coal Exchange shall be called by the Chairman of the Executive Committee for the second Friday in July of each year. The members present at such annual meeting shall constitute a quorum. Each member shall have one vote for each 5,000 tons of coal, or fraction, shipped through the Exchange monthly on the average during the immediately preceding year; the monthly average to be determined by dividing the total tonnage shipped during the year by the number of months in which the coal was shipped.

9. Elected members of the Executive Committee shall serve for a term of one year from the date of the annual meeting, and until their successors take office; vacancies shall be filled by the Executive Committee.

10. No person shall be elected to the Executive Committee whose company or firm is not a member of the Exchange.

11. The Executive Committee shall exercise supervision over the affairs of the Exchange to the extent herein provided, and may after due hearing amend the rules of the Exchange by affirmative vote concurred in by the representative of the Railway Company thereon. It shall meet on call of the Chairman.

12. All coal consigned in the Exchange classifications shall be graded and classified in designated pools

under the direction of the Executive Committee which shall have general charge of establishing or abolishing pools or classifications. Temporarily Classification "B" revised March 18, 1920, of the "Tidewater Coal Exchange" will be used.

13. The Executive Committee shall at all times protect the quality of coal shipped into the pool, through the Manager and a system of inspection, and analysis if necessary in their opinion, and may at any time suspend shipments from any mine when in their judgment the quality or preparation of such coal is below the proper standards.

14. All orders for delivery of coal to vessels must be placed with the Manager of the Exchange.

15. Coal will be taken into the records of the Exchange daily as it passes billing points. Members shall be entitled to receive coal from a classification on their orders according to priority of vessel register, but no orders for delivey of coal will be executed in excess of the tonnage standing in the name of a member on the Exchange records. Members, however, may enter into borrow and loan transactions as may be mutually advantageous to themselves, and the Manager shall at all times be available to act as an intermediary in such transactions to the extent he may be authorized by individual members.

16. In order to properly protect the charges of the carriers, it will be necessary for members of the Lamberts Point Coal Exchange to file with the Railway Company orders to make deliveries on the instructions of the Manager or his authorized representatives and members must furnish a blanket order as follows:

"Until further notice the Norfolk & Western Railway is hereby authorized to accept from the Manager of the Lamberts Point Coal Exchange his orders for delivery of any coal consigned for account of the undersigned in care of the Lamberts Point Coal Exchange."

17. Members of the Exchange, for whose account coal is shipped to the piers, shall be responsible to the Norfolk & Western Railway Company for demurrage charges accruing for their account, and for the freight charges (when waybilled collect), and vessel loading charges on coal unloaded into vessels for their account. Members shall file an agreement with the Railway Company as follows:

"I (or we) hereby agree to pay freight charges (when waybilled collect), and vessel loading charges on coal unloaded into vessels for my (or our) account on orders executed by the Manager of the Lamberts Point Coal Exchange, provided that bills for freight charges shall be so adjusted that they will not exceed the rates applicable on coal shipped to the piers for my (or our) account. The undersigned further agrees to pay any demurrage accruals under the tariff of the Railway Company, car days detention to be computed by subtracting the date of arrival of cars shipped for account of the undersigned from the date of release of equivalent cars."

18. Tidewater coal shippers and consignees must execute agreements in the form referred to in Articles 16 and 17 (Exchange Form B), and file one copy with the Norfolk & Western Railway Company and one copy with the Manager of the Exchange.

19. The Railway Company will furnish to the Manager of the Exchange by telegraph daily from bill-

ing points a report of carloads of coal (separated as to large cars and others) billed during the preceding 24 hours for account of each member, and a report by mail daily from the same source on Exchange Form 1.

20. The Manager will report currently to each member the tonnage added to or deducted from his account.

21. For the regulatory purposes of the railroad, and for information of members, a daily statement of estimated coal tonnage between waybilling points and the piers and vessel tonnage at the piers for account of each member, shall be mailed to all members of the Exchange and the railroad by the Manager. Members will subscribe to this by agreement on Exchange Form "C."

22. Adjustments on basis of actual weights determined shall be frequently made in estimated tonnage statements, and an abstract of account based on actual weight of coal shipped and delivered shall be rendered by the Manager to each member at intervals not exceeding one month.

23. Shipping instructions and railroad waybills (revenue and memorandum) shall show as the consignee the name of the member for whose account shipped, followed by the words "care Lamberts Point Coal Exchange Pool ———." Operators must consign coal in accordance with the classification of their mines.

24. Agents of the Railway Company at waybilling points will be supplied with copies of classifications and will see that all coal billed is consigned to the proper pool number, regardless of the pool number placed on consignment forms by operator. If any mine persists in consigning to improper pool number, Bill

ing Agent will report violation to the Manager of the Exchange, whereupon the mine will be embargoed from shipping in care of the Lamberts Point Coal Exchange.

25. No mine will be permitted to ship in care of the Lamberts Point Coal Exchange unless included in the classifications, reissues thereof, or supplements thereto. Any mine not so classified and which has orders for tidewater shipments, and desires to ship through the Exchange, should make application to the Manager for classification, when prompt investigation will be made and the mine added to classification list. The Norfolk & Western Railway will place embargo against shipments in care of the Lamberts Point Coal Exchange from unclassified mines.

26. The Railway Company will report to the Exchange corrections in billing involving weights and will send to members and to the Exchange daily report showing the reconsignment of shipments from or to the Exchange. No reconsignment to or from the Exchange will be made unless authorized by the Manager.

27. The Railway Company will report daily to the Exchange the number of cars of each pool at the port and en route and the approximate time of arrival in twenty-four hour periods.

28. Members shall report to the Exchange the names of the vessels which they have chartered for loading for their account, with the tonnage and pool number of the coal to be loaded into each and the probable arriving time of the vessels at the coal pier.

29. Cars containing coal which is rejected by the Inspectors of the Exchange from any particular pool, shall be designated as "unclassified" and responsibil-

ity for the disposition of same shall rest with the member on whose account the coal was shipped.

30. In all documents issued for the purpose of certifying the weight of coal loaded into vessels, the Railway Company, as agent for members, shall specify the amount of coal loaded in each vessel from each pool, the total amount of pool coal, the total amount of unclassified coal, if any, and the total coal loaded in the vessel. The Manager is authorized to furnish to shippers or consignee of the vessel, a statement showing the tonnage of each pool loaded in the vessel.

31. Car demurrage will be assessed by the Railway Company, on the average basis, for the account of individual shipper responsible. Detention will be computed by subtracting the date of arrival of cars shipped from date of release of equivalent cars. Credit car days of a member shipping in care of the Lamberts Point Coal Exchange, shall not offset debits of another member.

32. The Manager of the Exchange will maintain such records as may be required to show the disposition made of each car of coal handled through the Exchange.

33. Controversies with reference to the operation of the Exchange which cannot be adjusted by the Manager, shall be submitted to the Executive Committee for decision, subject to appeal to other bodies or to the courts as may be proper.

34. Any member willfully or persistently violating these rules to the injury of the Exchange, the Railway Company or fellow members, may be deprived of membership in the Exchange by the Executive Committee, after due hearing.

35. The Railway Company may discontinue the Exchange upon thirty days' notice to the members. Any member desiring to withdraw from the Exchange shall give written notice to the Manager of the Exchange at least thirty days prior to the date on which he wishes to terminate his membership, and shall be permitted to withdraw on the last day of the next succeeding month, provided he has liquidated his obligations to the Exchange.

36. In closing accounts, when differences between the tonnage of coal shipped by a member and the tonnage dumped into vessels for his account exist, due to variation in estimated weight of coal shipped from actual weight as determined, or for any other reason, and the differences cannot be adjusted by additional shipments, the debit shall be made good by payment for the tonnage involved at a fair market price as of the date the debit was determined.

OPINION

Upon Affidavits of Defense Raising Questions of Law.

(Filed March 9, 1923.)

Thompson, *J.*

These cases were argued together and, as the defenses raised in No. 8914 are included within those raised in No. 8922, they will be considered together. The plaintiff's claim in each case is for the recovery of demurrage charges upon cars containing bituminous coal for trans-shipment by vessel at Norfolk and Lambert Point, Virginia. The demurrage is alleged to be chargeable under Tariff C. and C. No. 4056, I. C. C. No. 2828-B, a copy of which is attached to each statement of claim. Both defendants were, at the time of the accrual of the demurrage, members of the Lambert's Point Coal Exchange. A copy of the articles of organization and rules of the exchange is attached to the statement of claim. The purpose of the exchange, Rule 2, is to reduce coal classifications and necessary switching thereof, to facilitate dumping, thereby expediting the dispatch of vessels and augmenting car supply at the mines; to act as agent for the pooling of coal, and to execute orders to the railway company for delivery of tonnage to vessels; to permit the use by a shipper of coal of the same pool to which the member has made shipments, and to the extent of such contributions without being required to apply on the delivery order of a member the identical coal consigned to him. Each member is required under Rule 16 to furnish a blanket order authorizing the railway to accept from the Manager of the Exchange, who is appointed and paid by the Railway Company, his orders for delivery of coal consigned

to the member in care of the Exchange. It is provided by Rule 17 that members shall be responsible to the Railway Company for demurrage charges accruing to their account and shall file an agreement with the Railway Company providing, *inter alia*, that "the undersigned further agrees to pay any demurrage accruals under the tariff of the Railway Company, car days detention to be computed by subtracting the date of arrival of cars shipped for account of the undersigned from the date of release of equivalent cars."

It is also provided in Rule 31 "car demurrage will be assessed by the Railway Company on the average basis for the account of individual shipper responsible. Detention will be computed by subtracting date of arrival of cars shipped from date of release of equivalent cars. Credit car days of a member shipping in care of the Lamberts Point Coal Exchange shall not offset debits of another member."

Under the tariff the cars subject to rules are cars containing coal for trans-shipment direct to vessels or to be stored for shipment by vessels when held for or by consignors or consignees for unloading, forwarding directions or for any other purpose, with exceptions immaterial to this case. The tariff allows a free time of five days per car time to be computed from the first 7 A. M. after the day on which notice of arrival is sent or given to the consignee. Sundays and legal holidays are excluded.

By Rule 3 (b)—"A car shall be considered as released:

1. At the time vessel registers for the cargo or fuel supply of which the coal, coal briquets or coke dumped into such vessel is a part, except that when cars are unloaded before the vessel registers such cars shall be released when unloaded.

2. To avoid delay that would be entailed in switching out and delivering on shipper's order, in actual sequence of arrival, cars containing the same grade of coal, as indicated by the identifying consigning names or numbers on the waybills, the dates on which cars should have been so released (as indicated by the record) will be substituted for the dates on which equivalent tonnage was actually delivered and the detention will be computed on the basis of such substituted dates.

3. The dates shipments are transferred by written order and acceptance to another party shall be considered the date of release of the car for the account of the original consignee and subsequent detention shall be charged in the account of the new consignee without any free time allowance.

4. Any fraction of day will be computed as one day."

By Rule 4: "Settlement shall be made on the basis of detention to all cars released during the month. The date of arrival notice shall be subtracted from the date of release. From the total days detention to all cars thus obtained, deduct all Sundays and legal holidays following the date of arrival and five (5) days free time allowance for each car, except on cars containing coke for export deduct ten (10) days free time allowance for each car: the remainder, if any, will be the number of days to be charged at the rate of $2 per car per day. Excess credit days of any one month cannot be deducted from the excess debit days of another month."

The statement of claim in each case after reciting the applicable provisions of the tariff avers that, at various times during certain months in 1920 and

1921, the Coal Company, defendant, received at Lamberts Point, Virginia, and disposed of by trans-shipment in vessels the equivalent in tonnage and in grade (as indicated by identifying consigning numbers) of carload shipments of coal, which coal had been transported in cars in interstate commerce by the railway company consigned to the Coal Company, care of Lamberts Point Coal Exchange at Lamberts Point, Virginia.

It is then averred that the Coal Company failed to dispose of the coal so consigned to the Coal Company or its equivalent within the free time provided by the tariff, whereby demurrage accrued thereunder as indicated in statements annexed to and made part of the statement of claim. The statements show as to each grade and consigning pool number and as to each car consigned to the Coal Companies and charged with demurrage the following information:

> "(a) Car initial and number;
>
> (b) The identifying consigning number indicating grade of coal;
>
> (c) Date on which notice of arrival was given the Coal Company;
>
> (d) Date of release which under the Tariff was date of registry of vessel into which the coal contained in the car, or its equivalent, was dumped;
>
> (e) Total days' detention;
>
> (f) Free time, including Sundays, legal holidays and five days Tariff allowance;
>
> (g) Number of days for which demurrage is payable or credit allowable."

There are also attached supplemental statements giving summaries of the detailed exhibits and showing the debit or credit days accruing in each month as to each consigning pool number and the net result made by adding the debits for each consigning pool

number or subtracting from such debits the number of credit days due.

The Emmons Company and its surety set up in the affidavit of defense that the Court has no jurisdiction to entertain the suit because the reasonableness of the tariff is in controversy in a complaint pending before the Interstate Commerce Commission in which the Emmons Company is a party complainant and the Norfolk & Western Railway Company is the defendant. This defense is not urged and will not be considered.

The statement sets out that the consignments were billed to the defendants in accordance with Rule 23, care Lamberts Point Coal Exchange. It is claimed on behalf of both defendants that therefore the demurrage is chargeable, if at all, against the Lamberts Point Coal Exchange and not against the defendants individually. This contention is directly contrary to the agreement set out in Article 17 of the Rules of the Exchange providing that members of the Exchange shall be responsible for the Railway Company's demurrage charges accruing to their account, and shall pay such demurrage accruals under the tariff of the Railway Company, computed as in this case. The cases cited by defendants in which "Care of" consignments have been construed, involve the question whether there was a good delivery or whether title passed upon delivery to the party in whose care the consignment was made or to the consignee named. I fail to see that these decisions have any material bearing upon the consignees' liability for demurrage.

By the terms of the articles of organization and rules of the Exchange, the latter is to act as an agency for the purposes recited and by the agreement under which the Railway Company appoints a manager to administer the affairs of the Exchange and pays his salary and certain expenses, the member agrees to

pay accrued demurrage. There is nothing in the articles and the rules divesting the members of property in their coal until under a member's order, coal consigned to his account is diverted to a vessel to fill the contract of another member having a credit for coal in the same pool. The member, therefore, has the rights of a consignee until his blanket order has been executed. This is apparent because the blanket order is expressly revocable upon notice. His title is not divested, therefore, until his coal is used as equivalent for that to be delivered on the contract of another member.

It is also objected that the tariffs cannot be construed in accordance with the plaintiff's claim except in connection with the articles and rules of the Exchange and that those rules were not filed with the Interstate Commerce Commission. Examination of the tariff and the rules are not convincing of the correctness of the defendant's contention. Every essential of the Railway Company's claim is in accordance with the terms of the tariff itself. It is therein provided that a car shall be considered as released at the time the vessel registers unless the cars are unloaded before registry in which case such car shall be released when unloaded. That the dates on which cars should have been so released (as indicated by the record) will be substituted for the dates on which equivalent tonnage was actually delivered and the detention will be computed upon the basis of such substituted dates. This is all in accordance with the agreement of the members of the Exchange as set out in its articles and rules. I find nothing in the statement of claim which bases a charge for demurrage upon anything provided for in the articles and rules which is not included within plain meaning of the tariff.

In short, while the articles and rules are set out in the Statement of Claim, they merely show what the

defendants, as members of the Exchange, through the Exchange as their agent, did to bring them within the terms of the tariff. The tariff, in my opinion, is complete in itself and no claim is made for any other service which affects the rates and charges for demurrage and which should necessarily and properly be made a part of the tariff filed under Section 6 of the Interstate Commerce Act. The charges were not assessed on the authority of the rules but on the authority of the tariff. That certain things were done in the way of substituting coal or shipping equivalent coal does not vary the tariff but merely shows the applicability of the tariff to the plaintiff's shipments.

It is objected that the tariff charges are without legal warrant because demurrage accrues only for the detention of a vehicle for transportation; and the provision of the tariff substituting the date on which a car should be released for the date when its equivalent is unloaded causes a car when unloaded to be charged with demurrage after its actual release. In this substitute or equivalent feature of the tariff there may be advantages to the shipper or consignee which offset apparent disadvantage to them and benefit to the Railway Company. It may be that the prompt switching and delivery to the vessel of equivalent coal substituted for that remaining on the tracks prevents delay and demurrage to the vessel and that in balancing of conditions the Coal Companies receive some advantage or some disadvantage. This is a matter which goes to the reasonableness of the tariff or its discriminating effect and is not for the Court to determine.

As far as appears in the Interstate Commerce Act in the decisions of the Commission or of the courts, there is no hard and fast rule prohibiting demurrage being charged on a basis other than per diem delay.

While it is true that it is charged for detention, there may be considerations which make allowable the extra charge beyond actual detention up to the time the car would have been unloaded, if prompt service in switching and the release of cars in order of arrival were not applied. The tariff may be unreasonable but I see nothing in it to make it unlawful upon other grounds than being unreasonable or discriminatory. When the tariff is filed or published, it becomes the law between the shipper and the carrier until the Interstate Commerce Commission has, upon the complaint of the shipper, determined what are the just and reasonable rates to be charged. Gimbel Brothers v. Barrett, 215 Fed. 1004. Texas and Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426.

Meanwhile, the carrier is prohibited from departing from the tariff or collecting any other charges than those therein contained and there is no provision in the law for a suspension of the tariff until the Commission has acted upon the application of the shipper. The carrier's only remedy, therefore, if the shipper fails or refuses to pay the tariff rates and charges, is to sue for their recovery. The remedy of the shipper, if the tariff is found by the Commission to be unjust or unreasonable or discriminatory, is upon a complaint to the Commission for reparation.

The defenses of law are held insufficient and are overruled with leave to the defendants to file affidavits of defense to the merits.

PETITION FOR AND RULE TO SHOW CAUSE WHY THE PLAINTIFF SHOULD NOT FURNISH DEFENDANTS CERTAIN INFORMATION NECESSARY TO STATE THEIR DEFENSES.

(Filed March 23, 1923.)

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

The petition of the Emmons Coal Mining Company and the Fidelity & Casualty Company of New York, the above-named defendants, respectfully represents:

First.—Your petitioners are the defendants named in the foregoing action, which is one brought by the plaintiff against the Emmons Coal Mining Company, as principal, and against the Fidelity & Casualty Company of New York, as surety, to recover certain alleged demurrage charges.

Second.—Defendants have heretofore filed affidavits of defense, raising questions of law, which have heretofore been argued and overruled by your Honorable Court, with the right to the defendants to file affidavits of defense to the facts.

Third.—Your petitioners aver that they have consulted counsel, are informed and believe and, therefore aver that they have just, true and legal defenses to a large part of the claim made by the plaintiff, the exact extent of which defenses they are unable to state at the present time, inasmuch as the same can only be determined, upon certain facts, documents and records exclusively within the plaintiff's possession,

which the plaintiff, upon request, has refused to disclose.

Fourth.—The facts, records, documents and information, which the defendants require, in order to properly prepare and state their defenses, which are within the exclusive knowledge, possession and control of the plaintiff, are the following:

A. With respect to Pools Nos. 5, 6, 7, 13 and 39, in the Lamberts Point Coal Exchange:

1. The number of arrived cars of coal in each of said pools at the beginning of each day during the period for which demurrage is claimed in said statement of claim.

2. The number of cars of coal received in each of said pools for each day, during the said period.

3. The number of cars of coal dumped from each of said pools each day, during said period.

4. The total amount of credits in terms of cars held by all members of the Exchange in each of said pools for each day of said period.

5. The total number of car demurrage days charged, with respect to each of said pools, for each day during said period.

B. The actual dumping date of each car shipped into the Exchange by or for the account of the defendant, Emmons Coal Mining Company, appearing on Exhibits "C," "D,"

"E," "F," "G" and "H" of the plaintiff's statement of claim.

Fifth.—Defendants aver that they are wholly unable to prepare their affidavits of defense without such information; that they have duly made application to the plaintiff, that they be furnished with said information or a reasonable opportunity to obtain the same, which application has been wholly refused and plaintiff has declined to give such information.

WHEREFORE, defendants pray that your Honorable Court grant a rule on the plaintiff to show cause why the prayer of your petitioners should not be granted and the plaintiff required to furnish the information herein referred to and will meanwhile grant a stay of all the proceedings herein.

EMMONS COAL MINING COMPANY.

THE FIDELITY & CASUALTY COMPANY OF NEW YORK.

By CONLEN, ACKER, MANNING & BROWN,
Attorneys for Emmons Coal Mining Company.

WM. G. WRIGHT,
Attorney for The Fidelity & Casualty Company of New York.

COMMONWEALTH OF PENNSYLVANIA, } *ss.:*
COUNTY OF PHILADELPHIA, }

J. G. EMMONS, being duly sworn according to law, deposes and says that he is treasurer of EMMONS COAL MINING COMPANY, the above-named defendant; that he is duly authorized to make this affidavit in its behalf and on behalf of its co-defendant, THE FIDELITY & CASUALTY COMPANY OF NEW YORK; that he is specially informed as to the facts set forth in the foregoing petition, except in so far as the same are stated from information and belief, the same are true, and in so far as the same are stated upon information and belief, deponent is so informed and verily believes the same to be true and expects to be able to establish the same by competent proof, if required.

Sworn to subscribed before me this 23d day of March, A. D. 1923. } J. G. EMMONS.

JENNIE C. O'NEILL,
(Seal) *Notary Public.*
Commission expires March 10, 1925.

RULE.
(Filed March 23, 1923.)

Before THOMPSON, *J.*

AND NOW, TO WIT, this twenty-third day of March, A. D. 1923, upon consideration of the foregoing petition and on motion of Conlen, Acker, Manning & Brown, attorneys for EMMONS COAL MINING COMPANY, and W. G. Wright, attorney for THE FIDELITY & CASUALTY COMPANY OF NEW YORK, the Court grants a rule upon the plaintiff to show cause why it should not give to the defendants, the information set forth in the

foregoing petition; meanwhile all proceedings to stay.

Rule returnable twenty-third day of March, A. D. 1923, at 3.30 o'clock M.

Room 310, Postoffice Building.

By THE COURT.

Attest:

LEO A. LILLY,
Deputy Clerk.

SEPARATE AFFIDAVIT OF DEFENSE OF EMMONS COAL MINING COMPANY.

(Filed May 11, 1923.)

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *ss.:*

J. G. EMMONS, being duly sworn according to law, deposes and says that he is secretary and treasurer of EMMONS COAL MINING COMPANY, one of the above-named defendants; that the said EMMONS COAL MINING COMPANY has a full, just, true and complete defense to a part of the plaintiff's claim of the following nature and character.

1. Admitted.

2. Admitted.

3. Defendant has consulted counsel, is informed and believes that the allegations of paragraph 3 constitute merely plaintiff's statement as to the contents of said tariff; that the said tariff is in writing and speaks for itself and that defendant is not required to further answer the allegations of said paragraph 3.

Without waiving the above objection defendant denies that the averments of paragraph 3 constitute a correct statement of the provisions of the said tar-

iff, particularly so in that they omit a certain provision, to wit, the latter part of Rule 3 (b) 1, and in other particulars with relation to the substitution of dates. For greater particularity defendant refers to the said tariff constituting Exhibit "A" of the said statement of claim.

4. Defendant admits that at various times during the months set forth in paragraph 4 of said statement of claim, with the exceptions of February and March, 1921, there arrived at Lamberts Point, Virginia, certain cars of coal consigned in the name of the defendant, in care of the Lamberts Point Coal Exchange and that the defendant gave to the said Lamberts Point Coal Exchange and to the said railroad, orders to dump said coal into certain vessels at the Lamberts Point piers. Defendant admits that the said coal had been transported in cars in interstate commerce, by the plaintiff.

Except as hereinabove expressly admitted, defendant denies the allegations of said paragraph 4.

5. Defendant admits that the Lamberts Point Coal Exchange was organized but avers that the organization of the said exchange was principally for the benefit of the said Norfolk & Western Railway Company. Defendant admits that it was a member of the exchange during the period in question and admits that Exhibit "B" is a correct copy of the Articles of Organization and Rules of the Lamberts Point Coal Exchange and admits that as a member of said exchange it signed the forms provided by Articles 16 and 17 of said rules. As to the remaining allegations of paragraph 5 of said statement of claim, defendant has consulted counsel, is informed and believes that the same constitute only the plaintiff's statement of the provisions of said Articles of Organization and Rules of the Lamberts Point Coal Exchange which are in writing

and speak for themselves and that defendant is not required to further answer the same.

Without waiving, however, this objection, defendant, except as hereinabove expressly admitted denies all the allegations of paragraph 5 of said statement of claim.

6. Except as hereinafter expressly admitted, defendant denies the allegations of paragraph 6 of the said statement of claim.

Defendant admits that with respect to all the cars referred to in Exhibits "C" and "C-1," "D" and "D-1," "E" and "E-1," "F" and "F-1," "G" and "G-1," "H" and "H-1," attached to the plaintiff's statement of claim, except those cars set forth in Exhibit "1," "a" to "w," both inclusive, hereto attached, made part hereof, with like force and effect as if all of said cars referred to in said exhibit were herein set forth in full, plaintiff's claim is correct, as made. As to the cars set forth in said Exhibit "1," "a" to "w," both inclusive, defendant denies the allegations of paragraph 6 and the correctness of plaintiff's calculation of demurrage thereon and avers that the true and correct dates of the release of said cars, under said tariff are the dates appearing in the right-hand column of each sheet of said exhibit under the heading "Date Unloaded."

Defendant further avers that demurrage calculated as of the correct and legal dates under the said tariff, for each of said months for which plaintiff claims demurrage is that appearing in the right-hand column of Exhibit "2" hereto attached and made part hereof, which sets forth in parallel columns the following information:

First.—Month in question.

Second.—Pool number, indicating kind and grade of coal.

Third.—The number of the sheet of the exhibits referred to in paragraph 6 of said statement of claim for the respective months to which reference is made.

Fourth.—The number of cars on each of said sheets as claimed by the plaintiff, applicable to such month.

Fifth.—The number of cars as to which defendant denies the plaintiff's allegation as to date of release as appears in full from Exhibit "1," "a" to "w," both inclusive, of this affidavit of defense.

Sixth.—The amount of demurrage claimed by the plaintiff for each month.

Seventh.—Correct amount of demurrage calculated in accordance with the provisions of the tariff.

7. Except as herein expressly admitted defendant denies the allegations of paragraph 7 of said statement of claim; on the contrary avers that as appears from Exhibit "3" hereto attached, made part hereof, and Exhibts "1," "a" to "w" and "2" hereinabove referred to, the correct amount of demurrage due by the defendant to the plaintiff is as follows:

For the month of September, 1920,	None
For the month of October, 1920,	$124.00
For the month of December, 1920,	885.80
For the month of January, 1921,	119.48
For the month of February, 1921,	None
For the month of March, 1921,	2,877.82
Making a total of,	$4,007.10

against which defendant is entitled to credit in the sum of $32, being the excess amount paid by defendant to the plaintiff on or about August 18, 1921, on account of demurrage charged for the month of June, 1920. Defendant is also entitled to credit against the above amount of $4007.10, of $113.10, being the amount of war tax included therein and which is not collectible, making the net amount of demurrage due as aforesaid of $3862, which the defendant at all times has been and now is ready, able and willing to pay.

Defendant denies that it is indebted to the plaintiff in any sum in excess of the amount hereinabove admitted.

8. Defendant admits that it, as principal, and THE FIDELITY & CASUALTY COMPANY OF NEW YORK, as surety, gave to the plaintiff the bond, true and correct copy whereof is marked Exhibit "K" and attached to the said statement of claim.

Defendant avers that as to the remaining allegations of paragraph 8, said bond is in writing and speaks for itself and defendant is not required to further answer the same. Defendant denies all the remaining allegations of paragraph 8 in so far as they are inconsistent with said Exhibit "K."

9. Defendant admits that it has at all times refused to pay to the plaintiff the said sum of $16,237.42 but avers that it has at all times been ready, able and willing to pay to the plaintiff a proper and lawful amount of demurrage due under the said tariff but the plaintiff has at all times failed and refused to give to the defendant a proper and correct statement thereof or information necessary for the defendant to compute the same. Defendant denies there has been any default or breach on its part whereby it or the said surety became liable on the said bond in any ex-

tent whatsoever and therefore denies the remaining averments of said paragraph 9 and further denies that it is liable for interest in any sum whatsoever.

Defendant admits that the plaintiff claims judgment against this defendant for $16,237.42 and against THE FIDELITY & CASUALTY COMPANY OF NEW YORK, in the sum of $10,000 with interest in both cases but denies that the plaintiff is entitled to any sum other than that above admitted, to wit, $3862, and for the reasons above set forth denies that the plaintiff is entitled to interest in any sum whatsoever.

Further answering said statement of claim defendant avers:

10. That the plaintiff's statement of account of demurrage assessed against the defendant is not predicated upon a tariff filed with the Interstate Commerce Commission in that said statement is predicated on a rule for assessing demurrage contained in certain Rules and Regulations of the Lamberts Point Coal Exchange which is contrary to the provisions of the plaintiff's demurrage tariff, Interstate Commerce Commission 2828-B, duly filed with the Interstate Commerce Commission, in violation of Section 6 of the Interstate Commerce Act (41 Stat. at Large, 474). That the defendants accordingly have been denied their right under the aforesaid Federal statute to be assessed demurrage charges on interstate shipments only pursuant to tariffs filed with the Interstate Commerce Commission.

11. The plaintiff in computing the demurrage charges against the defendant has not legally applied the tariff filed with the Interstate Commerce Commission in that they have failed to release cars unloaded into vessels as is required under Rule 3, paragraph (b) of said tariff known as Norfolk and West-

ern Railway Tariff, Interstate Commerce Commission 2828-B contrary to the provisions of Section 6 of the Interstate Commerce Act (41 Stat. at Large, 474). That judgment for the demurrage charges as assessed will deny the defendant their rights under said Federal statute to be charged on interstate transportation only such charges as are legally applicable under all of the provisions of the tariff filed with the Interstate Commerce Commission as required by said statute.

12. That the plaintiff's claim for demurrage is illegal as being in violation of its tariff, Interstate Commerce Commission 2828-B, and unlawful as being in violation of Section 6 of the Interstate Commerce Act (41 Stat. L. 474) and is unjust and unreasonable as being in violation of Section 1 of said act in that demurrage is assessed in said account upon equipment not in fact detained but which is rolling from the mines to tidewater or *vice versa*.

13. That the issues involved in this case have been duly and legally submitted to the Interstate Commerce Commission in a case of Smokeless Fuel Company, *et al.* v. Norfolk and Western Railway Company, *et al.*, Interstate Commerce Commission Docket 13281, and that the said Commission is about to render its opinion on the issues here involved and that said Commission has the sole jurisdiction under the Interstate Commerce Act (41 Stat. at Large, 474) to determine whether or not the railroad practices under this tariff are reasonable and lawful and whether the account here sued on is legally rendered.

14. The defendant admits so much of the plaintiff's demurrage account as would be predicated on the release of cars as provided by Rule 3 (b) paragraph 2 of said Interstate Commerce Commission Tariff 2828-B, subtracting therefrom the cars released

under Rule 3 (b) 1 of the said tariff but which plaintiff in making its demurrage calculations has illegally and unlawfully ignored.

15. The defendant admits so much of the plaintiff's demurrage account as applies to cars left standing on track which should have been dumped into the particular vessels concerned in observance of the order of their arrival for which, however, other cars were dumped in their stead, and agrees with the plaintiff that as to such cars under paragraph 2 of Rule 3 (b) of its tariff, Interstate Commerce Commission 2828-B, demurrage is due on each of such cars based upon detention figured from the date of arrival notice until date upon which the vessel registered into which the substituted cars were dumped as indicated specifically with respect to each such car in plaintiff's itemized statement filed as Exhibits "C" and "C-1," "D" and "D-1," "E" and "E-1," "F" and "F-1," "G" and "G-1," "H" and "H-1" inclusive, to its statement of claim. The defendant admits so much of the plaintiff's demurrage account as applies to cars which had not arrived at the piers for which, however, other cars were dumped in their stead into vessels being loaded for account of the defendant and agrees with the plaintiff that as to such cars no demurrage can legally be assessed but that five days free time must be credited to each such car as indicated in plaintiff's itemized statement filed as Exhibits "C" and "C-1," "D" and "D-1," "E" and "E-1," "F" and "F-1," "G" and "G-1," "H" and "H-1" inclusive to plaintiff's statement of claim. But the defendant denies liability for the remainder of the bill or so much thereof as applies to cars which as a matter of fact had been dumped into other vessels prior to the registering date of the vessel to which they are credited on plaintiff's itemized statement as exhibits marked as

aforesaid because the bill as to these cars assesses demurrage as if they had been detained under load when as a matter of fact they were not under load and had been dumped on some date prior to the registering of the vessel, which dates the defendant stands ready to prove, as set forth in Exhibit "1," "a" to "w" both inclusive, hereto. Defendant alleges that under paragraph 1 of Rule 3 (b) of plaintiff's Tariff Interstate Commerce Commission 2828-B, these last-mentioned cars are released as of the date (they were unloaded) (the vessel into which they were dumped, registered); that the credits which would accumulate in favor of the defendant by so releasing such cars operates greatly to reduce the demurrage charges as assessed. That the account as rendered totals $16,-237.42; that if credit is given for the release of cars dumped as provided by said paragraph 1 of Rule 3 (b) of the tariff, the account would amount to only $3862.

16. All of the above averments, except where the same are alleged upon information and belief are true and correct and in so far as the same are alleged upon information and belief, defendant is so informed, believes the same to be true and expects to be able to prove the same upon the trial of this cause.

WHEREFORE defendant denies that it is indebted to the plaintiff otherwise than in the sum of $3862, which the defendant is ready, able and willing to pay and hereby tenders to the plaintiff.

Sworn to and subscribed before me this 11th day of May, A. D. 1923. } J. G. EMMONS.

HOWARD E. FOULKROD,
(Seal) *Notary Public.*

My commission expires March 7, 1925.

EXHIBIT "1a."

STATEMENT OF CARS AS TO WHICH DATE OF RELEASE IS IN CONTROVERSY ON BILL FOR SEPTEMBER, 1920—POOL #5, SHEET #1.

CARS CREDITED TO S. S. SCHONFELS—REGISTERED SEPT. 9, 1920.

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
SOU	106336	23 for August	8/22
SOU	101135	32 " "	8/24
IRR	2085	32 " "	8/24
SOU	107360	29 " "	8/23
CC&O	43229	27 " "	8/23
IRR	2447	42 " "	8/26
SOU	184792) 184972)	43 " "	8/26
IRR	2534	54 " "	8/30
CN&STP	302005	48 " "	8/28
N&W	44895	52 " "	8/30
N&W	79090	48 " "	8/28
M&STL	21877	3 " September	9/4
IC	92217	57 " August	8/31
N&W	57479	57 " "	8/31
IRR	2201	52 " "	8/30
IRR	5319	1 " September	9/2

EXHIBIT "1b."

STATEMENT OF CARS AS TO WHICH DATE OF RELEASE IS IN CONTROVERSY ON BILL FOR SEPTEMBER, 1920—POOL #6, SHEET #1.

CARS CREDITED TO S. S. HANAN—REGISTERED SEPT. 13, 1920.

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
INT	5208	37 for August	8/25
INT	5103	37 " "	8/25
INT	2641	37 " "	8/25
SOU	97523	34 " "	8/24
SOU	97546	30 " "	8/24
P&R	87430	25 " "	8/23
N&W	50146	37 " "	8/25
SOU	98605	41 " "	8/26
CC&O	43161	37 " "	8/25
N&W	59502	38 " "	8/25
N&W	56200	38 " "	8/25

CARS CREDITED TO S. S. MUSKEGON—REGISTERED SEPT. 17, 1920.

INT	5323	37 for August	8/25
INT	5225	37 " "	8/25
SOU	107037	37 " "	8/25
B&O	144865	38 " "	8/25

EXHIBIT "1c."

STATEMENT OF CARS AS TO WHICH DATE OF RELEASE IS IN CONTROVERSY ON BILL FOR SEPTEMBER, 1920—POOL #6, SHEET #2.

CARS CREDITED TO S. S. MUSKEGON—REGISTERED SEPT. 17, 1920.

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
N&W	73176	36 for August	8/25
CC&O	44940	38 " "	8/25
INT	5154	37 " "	8/25
N&W	59672	41 " "	8/26
SV&E	226191	41 " "	8/26
N&W	55971	40 " "	8/26
INT	2265	40 " "	8/26
INT	5119	40 " "	8/26
CC&O	42164	6 " September	9/6
CNJ	49147	46 " August	8/27
INT	5181	6 " September	9/7
N&W	7258	6 " "	9/7
INT	2216	6 " "	9/7
N&W	56023)		
	56028)	9 " "	9/10
B&O	229273	10 " "	9/10
N&W	84852	10 " "	9/10
INT	2644	6 " "	9/7
N&W	8378	59 " August	8/31
N&W	79211	59 " "	8/31
SHAW	16659	59 " "	8/31
N&W	81666	59 " "	8/31
N&W	80727	46 " "	8/27
CC&O	40619	45 " "	8/27
CC&O	44570	45 " "	8/27
SOU	184307	45 " "	8/27
L&NE	4447	46 " "	8/27

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
P&LE	1771)		
	17710)	58 for August	8/31
CB&Q	177931	59 " "	8/31
B&O	126523	59 " "	8/31
N&W	75009	56 " "	8/31
N&W	54168	58 " "	8/31
N&W	81237	58 " "	8/31
INT	2205	53 " "	8/30
N&W	55091	5 " September	9/7
PRR	157378	5 " "	9/7
N&W	82906	5 " "	9/7
N&W	73273	12 " "	9/10
C&O	60475	7 " "	9/8
B&O	127164	7 " "	9/8
N&W	52371	7 " "	9/8
N&W	53309	7 " "	9/8
N&W	57359	21 " "	9/15

EXHIBIT "1d."

STATEMENT OF CARS AS TO WHICH DATE OF RELEASE IS IN CONTROVERSY ON BILL FOR SEPTEMBER, 1920—POOL #6, SHEET #3.

CARS CREDITED TO S. S. MUSKEGON—REGISTERED SEPT. 17, 1920.

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
PL	723933	13 for September	9/12
N&W	53839)		
	53899)	18 " "	9/14
PL	708132	18 " "	9/14
N&W	58347	22 " "	9/15
CC&O	41988	20 " "	9/15

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
CC&O	40476	13 for September	9/12
N&W	75503	18 " "	9/14
N&W	52915	18 " "	9/14
NYS&W	10832	18 " "	9/14
BR&P	44917	18 " "	9/14
PRR	215092	18 " "	9/14
PRR	150951	18 " "	9/14
ERIE	30949	18 " "	9/14
N&W	55860	19 " "	9/15
PRR	409448	19 " "	9/15
CC&O	44628	24 " "	9/15
CC&O	40588	24 " "	9/15
CC&O	40947	24 " "	9/15
NYC	402288	24 " "	9/15

EXHIBIT "1e."

STATEMENT OF CARS AS TO WHICH DATE OF RELEASE IS IN CONTROVERSY ON BILL FOR SEPTEMBER, 1920—POOL #7, SHEET #1.

CARS CREDITED TO S. S. SCHONFELS—REGISTERED SEPT. 9, 1920.

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
N&W	58522	47 for August	8/28
N&W	56213	47 " "	8/28
N&W	55278	11 " September	9/10

EXHIBIT "1f."

STATEMENT OF CARS AS TO WHICH DATE OF RELEASE IS IN CONTROVERSY ON BILL FOR SEPTEMBER, 1920—POOL #13, SHEET #1.

CARS CREDITED TO S. S. WEST IRMO—REGISTERED SEPT. 21, 1920.

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
INT	5162	50 for August	8/30
INT	5144	35 " "	8/25
CC&O	45136	8 " September	9/9
INT	5231	4 " "	9/7
P&LE	37263	2 " "	9/3

EXHIBIT "1g."

STATEMENT OF CARS AS TO WHICH DATE OF RELEASE IS IN CONTROVERSY ON BILL FOR SEPTEMBER, 1920—POOL #39, SHEET #1.

CARS CREDITED TO S. S. WEST IRMO—REGISTERED SEPT. 21, 1920.

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
NYC	329753	33 for August	8/24
CC&O	44116	39 " "	8/25
PWV	58415	39 " "	8/25

EXHIBIT "1h."

STATEMENT OF CARS AS TO WHICH DATE OF RELEASE IS IN CONTROVERSY ON BILL FOR OCTOBER, 1920—POOL #6, SHEET #1.

CARS CREDITED TO SCHOONER ISE DE CEYLON— REGISTERED OCT. 1, 1920.

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
CC&O	44710	24 for September	9/15
CC&O	40816	24 " "	9/15
LV	18899	24 " "	9/15
CC&O	43024	23 " "	9/15
CC&O	41337	23 " "	9/15
CC&O	43436	23 " "	9/15
CC&O	42297	28 " "	9/21
CC&O	41974	28 " "	9/21
PRR	197114	28 " "	9/21
B&O	232638	25 " "	9/20
LV	22501	25 " "	9/20
SOU	321047	25 " "	9/20
CC&O	43931	25 " "	9/20
CC&O	40520	33 " "	9/23
CC&O	44944	33 " "	9/23
CC&O	43329	28 " "	9/21

EXHIBIT "1i."

STATEMENT OF CARS AS TO WHICH DATE OF RELEASE IS IN CONTROVERSY ON BILL FOR OCTOBER, 1920—POOL #6, SHEET #2.

CARS CREDITED TO SCHOONER ISE DE CEYLON—REGISTERED OCT. 1, 1920.

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
PL	683685	28 for September	9/21
CC&O	42412	34 " "	9/23
NH	120533	34 " "	9/23
CC&O	42849	34 " "	9/23
CC&O	46092	35 " "	9/23
MC	8480	35 " "	9/23
N&W	7553	17 " October	10/13
WM	10780	17 " "	10/13
P&R	73347	17 " "	10/13
N&W	77888	17 " "	10/13
N&W	58976	20 " "	10/15
WM	11669	20 " "	10/15
N&W	76931	20 " "	10/15
N&W	7148	22 " "	10/18

EXHIBIT "1j."

STATEMENT OF CARS AS TO WHICH DATE OF RELEASE IS IN CONTROVERSY ON BILL FOR OCTOBER, 1921—POOL #39, SHEET #1.

CARS CREDITED TO S. S. TIBERTON—REGISTERED OCT. 6, 1920.

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
CC&O	40576	31 for August	8/24
SOU	98237	33 " "	8/24
CC&O	41829	44 " "	8/27
CC&O	40128	44 " "	8/27
CC&O	44303	44 " "	8/27
BR&P	43524	1 " October	10/1
WM	13132	4 " "	10/2
CC&O	20474	4 " "	10/2
CC&O	40424	2 " "	10/1
CC&O	42527	2 " "	10/1
CC&O	42473	2 " "	10/1
CC&O	44283	6 " March	3/31

EXHIBIT "1k."

STATEMENT OF CARS AS TO WHICH DATE OF RELEASE IS IN CONTROVERSY ON BILL FOR DECEMBER, 1920—POOL #5, SHEET #1.

CARS CREDITED TO S. S. HERCULES—REGISTERED DEC. 9, 1920.

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
SAL	36076	3 for December	12/4
PRR	179642	4 " "	12/4
N&W	75117	7 " "	12/6
B&L	10241	9 " "	12/6
N&W	7836	5 " February	2/5

EXHIBIT "1l."

STATEMENT OF CARS AS TO WHICH DATE OF RELEASE IS IN CONTROVERSY ON BILL FOR DECEMBER, 1920—POOL #6, SHEET #1.

CARS CREDITED TO TRANSFER TO MATLACK COAL & IRON CORP.—REGISTERED DEC. 4, 1920.

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
N&W	7026	1 for November	11/2

CARS CREDITED TO S. S. GUERNSEY—REGISTERED DEC. 18, 1920.

N&W	7710	1 for November	11/2
CTH&SE	7722	8 " December	12/6

EXHIBIT "1m."

STATEMENT OF CARS AS TO WHICH DATE OF RELEASE IS IN CONTROVERSY ON BILL FOR DECEMBER, 1920—POOL #6, SHEET #2.

CARS CREDITED TO S. S. GUERNSEY—REGISTERED DEC. 18, 1920.

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
PL	705426	8 for December	12/6
PL	732872	22 " "	12/13
N&W	13734	12 " "	12/10
N&W	58369	10 " "	12/10
N&W	7397	8 " "	12/6
D&H	4823	8 " "	12/6
CNJ	48120	6 " November	11/13
N&W	8180	6 " "	11/13

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
N&W	7894	8 for November	11/13
N&W	51554	7 " "	11/13
N&W	84796	10 " "	11/14
P&LE	37404	14 " "	11/24
N&W	54882	11 " "	11/15
N&W	7222	13 " "	11/19
N&W	83804	12 " "	11/19
N&W	77877)		
	77897)	12 " "	11/19
N&W	57369	13 " "	11/19
N&W	53956	13 " "	11/19
N&W	55082	13 " "	11/19
CNJ	61818	13 " "	11/19
P&R	73160	12 " "	11/19
K&M	7996	12 " "	11/19
N&W	76984	12 " "	11/19
N&W	76986	12 " "	11/19
N&W	83777	20 " "	11/29
SV&E	227606	14 " "	11/24
P&R	73561	14 " "	11/24
N&W	51601	14 " "	11/24
N&W	85553	15 " "	11/25
N&W	7490	15 " "	11/25
N&W	85316	14 " "	11/24
N&W	7473	15 " "	11/25
N&W	13774	14 " "	11/24
DL&W	78948	15 " "	11/25
P&R	77512	14 " "	11/24
N&W	79459	14 " "	11/24
N&W	83518	14 " "	11/24
N&W	8077	14 " "	11/24
N&W	8426	14 " "	11/24
N&W	7838	14 " "	11/24

EXHIBIT "1n."

STATEMENT OF CARS AS TO WHICH DATE OF RELEASE IS IN CONTROVERSY ON BILL FOR DECEMBER, 1920—POOL #6, SHEET #3.

CARS CREDITED TO S. S. GUERENSEY—REGISTERED DEC. 18, 1920.

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
N&W	54630	14 for November	11/24
CCC&StL	73487	14 " "	11/24
PL	749834	14 " "	11/24
C&O	50181	14 " "	11/24
B&O	127589	14 " "	11/24
N&W	51892	17 " "	11/27
C&O	74889	17 " "	11/27
N&W	78643	15 " "	11/25
N&W	74446	15 " "	11/25
N&W	55109	15 " "	11/25
PRR	155866	15 " "	11/25
PL	918040	15 " "	11/25
PRR	253199	10 " December	12/10
N&W	54964	18 " November	11/28
N&W	75925	16 " "	11/26
PRR	166676	21 " December	12/13
BIG FOUR	79955	21 " "	12/13
BIG FOUR	79307	21 " "	12/13
B&O	224879	21 " "	12/13
C&O	60743	21 " "	12/13
B&LE	78947	21 " "	12/13
N&W	85780	21 " "	12/13
PRR	204143	21 " "	12/13
N&W	58361	10 " "	12/10
N&W	58449	24 " "	12/16
N&W	84355	23 " "	12/15

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
N&W	7226	5 for December	12/6
SV&E	226599	6 " "	12/6
N&W	79390	5 " "	12/6
B&O	20128	5 " "	12/6

EXHIBIT "1o."

STATEMENT OF CARS AS TO WHICH DATE OF RELEASE IS IN CONTROVERSY ON BILL FOR DECEMBER, 1920—POOL #6, SHEET #4.

CARS CREDITED TO S. S. GUERENSEY—REGISTERED DEC. 18, 1920.

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
NYC	415692	21 for December	12/13

EXHIBIT "1p."

STATEMENT OF CARS AS TO WHICH DATE OF RELEASE IS IN CONTROVERSY ON BILL FOR DECEMBER, 1920—POOL #7, SHEET #1.

CARS CREDITED TO S. S. HERCULES—REGISTERED DEC. 9, 1920.

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
N&W	78572	60 for August	8/31
WM	5596	11 " September	9/10
CC&O	40718	32 " "	9/23

EXHIBIT "1q."

STATEMENT OF CARS AS TO WHICH DATE OF RELEASE IS IN CONTROVERSY ON BILL FOR JANUARY, 1921—POOL #7, SHEET #1.

CARS CREDITED TO S. S. BLOOMYRA—REGISTERED JAN. 3, 1921.

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
N&W	7931	13 for December	12/11

EXHIBIT "1r."

STATEMENT OF CARS AS TO WHICH DATE OF RELEASE IS IN CONTROVERSY ON BILL FOR JANUARY, 1921—POOL #7, SHEET #2.

CARS CREDITED TO S. S. BLOOMYRA—REGISTERED JAN. 3, 1921.

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
N&W	7674	17 for December	12/11
N&W	73382	15 " "	12/11
N&W	8032	13 " "	12/11
N&W	82285	13 " "	12/11
N&W	13090	19 " "	12/12
N&W	50383	20 " "	12/12

EXHIBIT "1s."

STATEMENT OF CARS AS TO WHICH DATE OF RELEASE IS IN CONTROVERSY ON BILL FOR FEBRUARY, 1921—POOL #5, SHEET #1.

CARS CREDITED TO TRANSFER TO VIRGINIA SMOKELESS FUEL COMPANY—FEB. 21, 1921.

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
N&W	76344		12/28
N&W	50261		12/28

EXHIBIT "1t."

STATEMENT OF CARS AS TO WHICH DATE OF RELEASE IS IN CONTROVERSY ON BILL FOR MARCH, 1921—POOL #5, SHEET #2.

CARS CREDITED TO S. S. OTERIC—REGISTERED MARCH 30, 1921.

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
B&LE	41786	4 for February	2/7
MC	11005	3 " March	3/14
SOU	101184	7 " January	1/8
SOU	321496	7 " "	1/8
N&W	49258	7 " "	1/8
N&W	91646	7 " "	1/8
ERIE	22435	4 " March	3/18
B&LE	6288	2 " "	3/11
N&W	81338	20 " January	1/31
N&W	53798	19 " "	1/31
N&W	84620	20 " "	1/31
N&W	83231	6 " "	1/8

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
N&W	52983	6 for February	2/16
ERIE	22276	6 " "	2/16
N&W	85476	6 " "	2/16
N&W	7021	6 " "	2/16
C&O	54846	6 " "	2/16
N&W	53725	8 " "	2/19
WM	12408	8 " "	2/19

EXHIBIT "1u."

STATEMENT OF CARS AS TO WHICH DATE OF RELEASE IS IN CONTROVERSY ON BILL FOR MARCH, 1921—POOL #7, SHEET #1.

CARS CREDITED TO S. S. OTERIC—REGISTERED MARCH 30, 1921.

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
N&W	54416	12 for January	1/14

EXHIBIT "1v."

STATEMENT OF CARS AS TO WHICH DATE OF RELEASE IS IN CONTROVERSY ON BILL FOR MARCH, 1921—POOL #7, SHEET #2.

CARS CREDITED TO S. S. OTERIC—REGISTERED MARCH 30, 1921.

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
N&W	82053	18 for December	12/12
MC	8967	18 " "	12/12

EXHIBIT "1w."

Statement of Cars as to Which Date of Release is in Controversy on Bill for March, 1921—Pool #39, Sheet #1.

Cars Credited to S. S. Oteric—Registered March 30, 1921.

Car Initial	Car Number	Dumping Sheet No.	Date Unloaded
CC&O	41388	27 for October	10/28
CC&O	40371	27 " "	10/28
LS&MS	49539	13 " "	10/9
CC&O	40641	27 " "	10/28
CC&O	42026	24 " "	10/22
CC&O	41049	24 " "	10/22
CC&O	40559	24 " "	10/22
SOU	98410	26 " "	10/22
StL&SF	80679	24 " "	10/22
PL	705426	24 " "	10/22
CC&O	46073	24 " "	10/22
P&LE	11195	24 " "	10/22
CC&O	42980	26 " "	10/22
CC&O	41749	8 " "	10/5

EXHIBIT 2.

RECAPITULATION OF DEMURRAGE ACCOUNT
of the
NORFOLK & WESTERN RAILWAY COMPANY

vs.

EMMONS COAL MINING COMPANY

For Six Months From September, 1920, to March, 1921, Both Inclusive

Month	Pool No.	Sheet No.	No. Cars on Sheet	No. Cars Date of Release in Controversy	Amount Demurrage Charged by Railway Co.	Correct Amount Demurrage Legally Calculated on the Tariff
September, 1920	5	1	23	16		
	6	1	15	15		
	6	2	50	42		
	6	3	26	19		
	7	1	4	3		
	13	1	7	5		
	39	1	3	3		
	Total for Mo.		128	103	$2114.00	None
October, 1920	6	1	16	16		
	6	2	45	14		
	39	1	24	12		
	Total for Mo.		85	42	$1028.00	$124.00
December, 1920	5	1	23	5		
	6	1	3	3		
	6	2	50	40		
	6	3	50	30		
	6	4	8	1		
	7	1	10	3		
	Total for Mo.		144	82	$3775.98	$885.80
January, 1921	5	1	5			
	7	1	1	1		
	7	2	6	6		
	Total for Mo.		12	7	$364.62	$119.48

March	Pool No.	Sheet No.	No. Cars on Sheet	No. Cars Date of Release in Controversy	Amount Demurrage Charged by Railway Co.	Correct Amount Demurrage Legally Calculated on the Tariff
February, 1921	5	1	2	2		
	Total for Mo.		2	2	$164.80	None
March, 1921	5	2	27	19		
	7	1	1	1		
	7	2	2	2		
	39	1	14	14		
	Total for Mo.		44	36	$8790.02	$2877.82

EXHIBIT 3.

SUMMARY BY MONTH OF RECAPITULATION

Month	No. Cars on Statement	No. Cars in Controversy	Amount Demurrage Charged	Correct Amount Demurrage Legally Calculated on the Tariff
September, 1920	128	103	$2114.00	None
October, "	85	42	1028.00	$124.00
December, "	144	82	3775.98	885.80
January, 1921	12	7	364.62	119.48
February, "	2	2	164.80	None
March, "	44	36	8790.02	2877.82
Total	415	272	$16237.42	$4007.10
Less overpayment for June, 1920			32.00	32.00
			$16205.42	$3975.10
War Tax included in above			381.42	113.10
Net amount of Demurrage			$15824.00	$3862.00

AMENDED RULE FOR JUDGMENT FOR AMOUNT AS TO WHICH AFFIDAVIT OF DEFENSE IS INSUFFICENT.

(Filed May 16, 1923.)

To the Clerk:

Sir.—Please enter rule on Emmons Coal Mining Company, one of the defendants above named, to show cause why judgment should not be entered against it for $12,375.42, with interest as claimed in plaintiff's statement of claim, the amount as to which the affidavit of defense is insufficient, namely, the whole of the claim except $3862. Returnable the first Monday of June, 1923.

The affidavit of defense is deemed insufficient to withstand judgment in that the controlling facts upon which this cause of action is based, as set forth in plaintiff's statement of claim, are not denied in the affidavit of defense—defendant taking the position that the proper release date under Rule 3 (b) 1 of the tariff for a number of cars is the actual date such cars were unloaded. And on this theory defendant has restated the demurrage account as to such cars.

J. HAMILTON CHESTON,

F. M. RIVINUS,

THEODORE W. REATH,

Attorneys for Plaintiff.

Philadelphia, Pennsylvania, May 16, 1923.

AMENDED RULE FOR JUDGMENT FOR AMOUNT AS TO WHICH AFFIDAVIT OF DEFENSE IS INSUFFICIENT.

(Filed May 16, 1923.)

To the Clerk:

Sir.—Please enter rule on The Fidelity & Casualty Company of New York, one of the defendants above named, to show cause why judgment should not be entered against it for $10,000, with interest as claimed in plaintiff's statement of claim, the amount as to which the affidavit of defense is insufficient, namely, the whole of the amount of plaintiff's claim except $6237.42. Returnable the first Monday of June, 1923.

The affidavit of defense is deemed insufficient to withstand judgment in that the controlling facts upon which this cause of action is based, as set forth in plaintiff's statement of claim, are not denied in the affidavit of defense, defendant taking the position that the proper release date under Rule 3 (b) 1 of the tariff for a number of cars is the actual date such cars were unloaded. And on this theory defendant has restated the demurrage account as to such cars.

J. HAMILTON CHESTON,
F. M. RIVINUS,
THEODORE W. REATH,
Attorneys for Plaintiff.

Philadelphia, Pennsylvania, May 16, 1923.

OPINION

UPON RULE FOR JUDGMENT.

(Filed January 24, 1924.)

THOMPSON, *J.*

The identical defenses upon questions of law raised by the affidavit of defense were heretofore held insufficient upon statutory demurrer, which was overruled, with leave to the defendants to file affidavits of defense to the merits. 287 Fed. 168.

The same questions have been also discussed and determined to the same effect by the Interstate Commerce Commission in Smokeless Fuel Company, *et al.* v. Norfolk and Western Railway Company, No. 13,281, decided December 21, 1923.

So far as this court is concerned, the lawfulness and construction of the defendant's tariff may be regarded as settled.

The affidavit of defense admits the sum of $3862 to be due, and that sum, without interest, the plaintiff concedes, has been paid.

Judgment may be entered for the amount of the plaintiff's claim less the sum of $3862, with interest upon the total claim, less interest on $3862, from the time it was paid. The rule will be made absolute for the amount to be assessed accordingly.

ORDER FOR JUDGMENT AND ASSESSMENT OF DAMAGES.

(Filed April 30, 1924.)

To the Clerk:

Sir.—And now, to wit, April 28, 1924, in accordance with this Court's opinion making absolute plaintiff's rule for judgment for want of a sufficient affidavit of defense, please enter judgment in favor of the plaintiff and against the defendant above named, and assess the plaintiff's damages *sec. reg.*

J. HAMILTON CHESTON,
F. M. RIVINUS,
Attorneys for Plaintiff.

ASSESSMENT OF PLAINTIFF'S DAMAGES AGAINST EMMONS COAL MINING COMPANY.

Amount demanded in statement of claim,	$16,237.42
Interest, as demanded in statement of claim (for computation of interest, see attached sheet marked "A"),	2,925.13
Total amount,	$19,162.55
Less payment of May 15, 1923,	3,862.00
	$15,300.55

ASSESSMENT OF PLAINTIFF'S DAMAGES AGAINST FIDELITY AND CASUALTY COMPANY OF NEW YORK.

Amount demanded in statement of claim,	$10,000.00
Interest, as demanded in statement of claim (for computation of interest, see attached sheet marked "B"),	1,386.60
Total,	$11,386.60

E. G. JOHNSON,
Deputy Clerk of the Court.

SHEET "A."

COMPUTATION OF INTEREST AGAINST EMMONS COAL MINING COMPANY

6%	on	$ 2,114.00,	from	October	1, 1920,	to May	15, 1923,	$ 332.60
"	"	1,028.00,	"	November	1, 1920,	" May	15, 1923,	156.60
"	"	3,775.98,	"	January	1, 1921,	" May	15, 1923,	537.44
"	"	364.62,	"	February	1, 1921,	" May	15, 1923,	50.07
"	"	164.80,	"	March	1, 1921,	" May	15, 1923,	21.81
"	"	8,790.02,	"	April	1, 1921,	" May	15, 1923,	1,119.23
"	"	12,375.42,	"	May	15, 1923,	" April	28, 1924,	707.38
						Total,		$2,925.13

SHEET "B."

COMPUTATION OF INTEREST AGAINST FIDELITY AND CASUALTY COMPANY OF NEW YORK.

6% on $10,000.00, from January 6, 1922, to April 28, 1924.... $1,386.60

JUDGMENT.
(Filed April 30, 1924.)

Before THOMPSON, *J.*

AND Now, April 30, 1924, by præcipe filed, and in accordance with the opinion of the Court, judgment for want of sufficient affidavit of defense in the sum of fifteen thousand three hundred and 55/100 ($15,300.55) dollars is hereby entered in favor of plaintiff and against Emmons Coal Mining Company; judgment for want of sufficient affidavit of defense in the sum of eleven thousand three hundred eighty-six and 60/100 ($11,386.60) dollars is hereby entered in favor of plaintiff and against Fidelity and Casualty Company of New York.

By THE COURT.

Attest:

(Sgd.) E. G. JOHNSON,
Deputy Clerk.

STIPULATION OF COUNSEL.
(Filed May 1, 1924.)

AND Now, to wit, this twenty-ninth day of April, A. D. 1924, it was stipulated and agreed, by and between the attorneys for the respective parties hereto, that in lieu of the usual supersedeas bond, a bond be entered in the usual form of supersedeas bond by EMMONS COAL MINING COMPANY, as principal, with a qualified surety company as surety, in the amount of $4000, and that the Court, in allowing the writ of error herein, be requested to fix the bond in that sum.

J. HAMILTON CHESTON,
Per F. M. R.
F. M. RIVINUS,
Attorneys for Plaintiff,
CONLEN, ACKER, MANNING & BROWN,
Attorneys for Emmons Coal Mining Company, Defendant,
WILLIAM G. WRIGHT,
Attorney for The Fidelity & Casualty Company of New York, Defendant.

PETITION FOR WRIT OF ERROR.
(Filed April 30, 1924.)

To the Honorable the Judges of the said Court:

AND Now, to wit, April 30, 1924, come EMMONS COAL MINING COMPANY and THE FIDELITY & CASUALTY COMPANY OF NEW YORK, by their attorneys, and respectfully show that on the twenty-fourth day of Janu-

ary, A. D. 1924, the Court directed the entry of a judgment against your petitioners and in favor of the Norfolk & Western Railway Company, and upon said order, a final judgment was entered on the thirtieth day of April, A. D. 1924, against your petitioners the defendants above named.

Your petitioners feeling themselves aggrieved by the said order and judgment entered thereon as aforesaid, herewith petition the Court for an order allowing them to prosecute a writ of error to the Circuit Court of Appeals of the United States of the Third Circuit, under the laws of the United States in such cases made and provided.

Wherefore, the premises considered, your petitioners pray that a writ of error do issue, that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid, sitting at Philadelphia in said circuit, for the correction of the errors complained of and herewith assigned, be allowed, and that an order be made, fixing the amount of security to be given by the plaintiffs-in-error, conditioned as the law directs, and upon giving such bond as may be required, that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

CONLEN, ACKER, MANNING & BROWN,
Attorneys for Emmons Coal Mining Company.

WILLIAM G. WRIGHT,
Attorney for The Fidelity & Casualty Company of New York.

ORDER ALLOWING WRIT OF ERROR.
(Filed May 1, 1924.)

Before THOMPSON, *J.*

And now, May 1, 1924, prayer of petition granted. As per stipulation of counsel, amount of bond is fixed at $4000.

By THE COURT.

Attest:

GEORGE BRODBECK,
Clerk.

ASSIGNMENT OF ERRORS.
(Filed April 30, 1924.)

NOW come EMMONS COAL MINING COMPANY and THE FIDELITY & CASUALTY COMPANY OF NEW YORK, plaintiffs-in-error, in the above numbered and entitled cause, and in connection with their petition for writ of error in this cause, assign the following errors, which plaintiffs-in-error aver occurred in the course of the said proceeding and upon which they rely to reverse the judgment entered herein as appears of record.

1. That the Court erred in overruling the defendants' affidavits of defense raising questions of law as follows:

> "The defenses of law are held insufficient and are overruled with leave to the defendants to file affidavits of defense on the merits."

2. That the Court erred in discharging and refusing to make absolute defendants' rule to show cause why the plaintiff should not furnish the defendants certain information necessary to state their defenses as follows:

A. With respect to Pools Nos. 5, 6, 7, 13 and 39 in the Lamberts Point Coal Exchange:

1. The number of cars of coal in each of said pools at the beginning of each day during the period for which demurrage is claimed in said statement of claim.

2. The number of cars of coal received in each of said pools for each day, during the said period.

3. The number of cars of coal dumped from each of said pools each day, during said period.

4. The total amount of credits in terms of cars held by all members of the Exchange in each of said pools for each day of said period.

5. The total number of car demurrage days charged, with respect to each of said pools, on each day during said period.

3. That the Court erred in failing and refusing to discharge and in making absolute plaintiff's rule for judgment for want of a sufficient affidavit of defense.

4. That the Court erred in sustaining the plaintiff's rule for judgment for want of a sufficient affidavit of defense.

5. That the Court erred in directing the entry of judgment for the plaintiff for want of a sufficient affidavit of defense.

6. That the Court erred in entering judgment in favor of the plaintiff against the defendants.

CONLEN, ACKER, MANNING & BROWN,
Attorneys for Emmons Coal Mining Company.

WILLIAM G. WRIGHT,
Attorney for The Fidelity & Casualty Company of New York.

STIPULATION OF COUNSEL AS TO RECORD ON APPEAL.

(Filed June 13, 1924.)

And Now, to Wit, this twelfth day of June, A. D. 1924, it is stipulated and agreed by and between J. Hamilton Cheston, F. M. Rivinus and Theodore W. Reath, attorneys for plaintiff, and Conlen, Acker, Manning & Brown, attorneys for defendants, that the record to be printed on the appeal in the above case shall consist of the following, to wit:

1. Docket entries.

2. Plaintiff's statement of claim and exhibits thereto.

3. Emmons Coal Mining Company's affidavit of defense raising questions of law.

4. Opinion of the Court (Thompson, J.) upon affidavits of defense raising questions of law.

5. Defendants' petition for a rule to show cause why the plaintiff should not furnish defendants certain information necessary to state their defense.

6. Affidavit of defense of Emmons Coal Mining Company and exhibits thereto.

7. Amended rule for judgment against Emmons Coal Mining Company for amount as to which the affidavit of defense is insufficient.

8. Amended rule for judgment against The Fidelity & Casualty Company of New York for amount as to which the affidavit of defense is insufficient.

9. Opinion of Court (Thompson, J.) upon rule for judgment.

10. Order for entry of judgment and assessment of damages.

11. Stipulation of counsel as to appeal bond.

12. Petition for writ of error.

13. Assignment of errors.

14. Certificate of clerk.

It is further stipulated and agreed that the affidavits of defense filed on behalf of The Fidelity & Casualty Company of New York are identical with the affidavits filed by the Emmons Coal Mining Company in so far as any issues in this case are raised either in the court below or on appeal.

It is further stipulated and agreed that in printing the record the following shall be omitted:

1. Præcipe for summons assumpsit.

2. Summons and marshal's return thereto.

3. Affidavit of defense of The Fidelity & Casualty Company of New York raising questions of law.

4. Separate affidavit of defense of The Fidelity & Casualty Company of New York.

5. Original rule for judgment against The Fidelity & Casualty Company of New York for amount as to which affidavit of defense is insufficient.

6. Original rule for judgment against the Emmons Coal Mining Company for amount as to which affidavit of defense is insufficient.

J. HAMILTON CHESTON,

F. M. RIVINUS,

THEODORE W. REATH,

Attorneys for Plaintiff.

CONLEN, ACKER, MANNING & BROWN,

Attorneys for Defendants.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *Set.:*

I, GEORGE BRODBECK, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of so much of the pleas and proceedings; in the case of Norfolk & Western Railway Company v. Emmons Coal Mining Company and The Fidelity & Casualty Company of New York, No. 8922, December Term, 1921; as per stipulation filed, a copy of which is hereto attached, the transcript of record in the above-entitled cause is to include, now remaining among the records of the said court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia,
(Seal) this twentieth day of June, in the year of our Lord one thousand nine hundred and twenty-four, and in the one hundred and forty-eighth year of the Independence of the United States.

GEORGE BRODBECK,
Clerk.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1924

No. 3181

EMMONS COAL MINING CO. et al., Plaintiffs in Error,

vs.

NORFOLK & WESTERN RAILWAY CO., Defendant in Error

ARGUMENT AND SUBMISSION

And afterwards, to wit, 17th day of October, 1924, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Circuit Judge, Honorable Joseph L. Bodine and Honorable Robert M. Gibson, District Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 10th day of January, 1925, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

Before Buffington, Circuit Judge, and Bodine and Gibson, District Judges

OPINION—Filed Jan. 10, 1925

GIBSON, District Judge:

In the court below the Norfolk & Western Railway Company brought its action against the Emmons Coal Mining Company and The Fidelity & Casualty Company of New York to recover an amount alleged to be due as demurrage upon certain cars of coal shipped over the line of the plaintiff by the first-named defendant. The Fidelity & Casualty Company of New York was surety upon the bond of the Emmons Coal Mining Company, conditioned that the principal should pay all freight charges, demurrage, etc., due from it to the Railway Company. The defendants each filed an affidavit of defense raising questions of law, in effect a demurrer to plaintiff's statement. These defenses were overruled by the Court below, with leave given to defendants to answer as to the facts. Thereupon defendants obtained a rule upon the plaintiff to show cause why the latter should not furnish certain information relative to the cars upon which demurrage was claimed. This rule was made absolute as to part of the information demanded, and discharged as to the other matters of which discovery was sought. Then defendants

each filed an affidavit of defense, in effect the same, and plaintiff moved for judgment by reason of the alleged insufficiency of such affidavits. This motion was granted and judgment entered for the plaintiff. The assignments of error in the instant case set forth the overruling of the defendants' affidavits of defense raising questions of law, the discharge, in part, of the rule to show cause, and the entry of judgment for want of sufficient affidavits of defense.

The facts material to our present inquiry, as they appear from the pleadings, are substantially as follows:

The Emmons Coal Mining Company, in December, 1920, and January, February and March, 1921, shipped a number of cars of coal over the lines of the Norfolk & Western Railway to Lambert's Point, Virginia, for trans-shipment in vessels. At the time these shipments were made a tariff of charges of demurrage on cars containing coal for trans-shipment at Norfolk and Lambert's Point, Virginia, duly filed and published, was in effect on the Norfolk & Western Railway. The parts of the tariff applicable to our present inquiry are the following:

* * * * * * *

"Rule 2.—Free Time Allowed

An average of five (5) days per car free time will be allowed, except on coke for export, on which an average of ten (10) days per car free time will be allowed."

"Rule 3.—Computing Time

(a) A notice of arrival must be sent or given to the consignee in writing or as otherwise agreed to by carrier and consignee upon arrival of cars and billing at Norfolk Terminals, Va.

Time will be computed from the first 7 A. M. after the day on which notice of arrival is sent or given to the consignee.

* * * * * * *

(b) A car shall be considered as released:

1. At the time vessel registers for the cargo or fuel supply of which the coal, coal briquets or coke dumped into such vessel is a part, except that when cars are unloaded before the vessel registers such cars shall be released when unloaded.

2. To avoid delay that would be entailed in switching out and delivering on shipper's order, in actual sequence of arrival, cars containing the same grade of coal, as indicated by the identifying consigning names or numbers on the waybills, the dates on which cars should have been so released (as indicated by the record) will be substituted for the dates on which equivalent tonnage was actually delivered and the detention will be computed on the basis of such substituted dates.

3. The dates shipments are transferred by written order and acceptance to another party shall be considered the date of release of the car for the account of the original consignee and subsequent detention shall be charged in the account of the new consignee without any free time allowance."

* * * * * * *

"Rule 4.—Demurrage Charges

Settlement shall be made on the basis of detention to all cars released during the month. The date of arrival notice shall be subtracted from the date of release. From the total days detention to all cars thus obtained, deduct all Sundays and legal holidays following the date of arrival and five (5) days free time allowance for each car, except on cars containing coke for export deduct ten (10) days free time allowance for each car: the remainder, if any, will be the number of days to be charged at the rate of $2.00 per car per day. Excess credit days of any one month cannot be deducted from the excess debit days of another month."

At the time the aforementioned shipments of coal were made, the Emmons Coal Mining Company was a member of the Lamberts Point Coal Exchange, the object of which appears in the second of its articles of organization and rules, which follows:

"2. Object.—The organization of the Lamberts Point Coal Exchange is for the purpose of reducing coal classifications and necessary switching thereof; and to facilitate dumping, thereby expediting the despatch of vessels and augmenting car supply at the mines; and is to (a) Act as an Agency for the Pooling of coal, and to execute to the Norfolk & Western Railway Company orders of the members for delivery of tonnage to vessels; permitting the use by a shipper of coal of the same pool to which the member has made shipments, and to the extent of such contributions, without being required to apply on the delivery order of a member the identical coal consigned to him; and (b) To maintain a complete record of all shipments of coal consigned by the members in the various classifications and of orders received from members and executed to the Railway Company covering delivery of coal to vessels."

The Lamberts Point Coal Exchange, with its rules, was recognized by the Norfolk & Western Railway Company, which appointed and paid its Manager. Under the rules of the organization, each member shipped his coal to himself, care of the Lamberts Point Coal Exchange Pool. After the coal had passed Bluefield, West Virginia, it was credited to the shipper, and thereafter, coal to an equal amount could be delivered at any time to a vessel, provided his order were placed with the Manager of the Exchange. By the agreement of the members of the Exchange, the Manager was not required, in obeying the order of a member for the transshipment of his coal, to take such coal from cars shipped by that member and standing in

the yards of the Norfolk & Western Railway at the point of trans-shipment, but was permitted to dump cars shipped by another member which contained coal of a quality equal to that ordered out. It will be remembered that Rule 3-b 2, of the Demurrage Tariff, quoted supra, allowed a substitution of a car of a shipper of later arrival for one of the earlier arrival at the point of trans-shipment; and by the agreement of the members of the Exchange a further substitution of the car of one member for that of another was permitted.

Around this power of substitution centers the main controversy in the instant case. The Railway Company seeks to recover demurrage at the rate of $2.00 per day per car for the period between the arrival of the Emmons Coal Mining Company's cars and its order to the Manager of the Exchange to unload them, less the free time. The Coal Company, pointing out that demurrage charges are collectible only upon detention of cars, urges that the Railroad Company is not entitled to the sum claimed in its statement because that sum is demanded upon cars of the defendant actually unloaded, prior to the date to which demurrage is charged, to fill the order of another member of the Coal Exchange. It contends, although the coal of the substituting member may have been thereafter held in his car subject to the order of defendant, that the latter was absolved from subsequent demurrage when its own car was unloaded. It bases this contention, in the first place, upon its interpretation of the tariff; but further denies liability, in case its interpretation is held to be erroneous, on the allegation that the demurrage charge of the Statement of Claim can be sustained only by reading into the tariff the rules of the Lamberts Point Coal Exchange—an illegal interpolation, as the tariff must be complete in itself.

In its interpretation of the tariff, defendant cites Rule 3-b-1, supra, to sustain its contention that demurrage cannot be collected after the shipper's car has been unloaded pursuant to an order of another. That part of Rule 3 provides that a car shall be considered as released at the time the vessel registers, "except that when cars are unloaded before the vessel registers such cars shall be released when unloaded." This interpretation of the rule is plainly not justified by an examination of the context. The exception in 3-b-1 is intended to cover the unloading of the coal into the vessel prior to the registry, not the dumping of the car of one shipper as the equivalent of that ordered to be unloaded by another. The vice of the defendant's interpretation is almost shown by its result, namely, that where a car of one shipper has been dumped pursuant to the order of another, the cars of both shippers would be released despite the fact that one would still remain in the railroad yards.

The defendant's interpretation of paragraph 3 of Rule 3-b, supra, as affecting equivalent shipments on the part of members of the Coal Exchange, is also not justified. No transfers "by written order and acceptance," such as are contemplated by the rule, are under consideration in the present issue, and the section cannot be cited as authority for defendant's claim that it was released from the demurrage claimed in the present action.

As we read the Tariff, we are satisfied that it plainly contradicts

defendant's contention that it absolves defendant from payment of demurrage upon cars unloaded in substitution of cars of another member of the Coal Exchange. Some clauses of it, each read by itself, may be lacking in clarity, but, read in conjunction with the entire context, they quite clearly sustain the interpretation of the plaintiff company.

A study of the Tariff has convinced us, also, of the lack of force in defendant's further contention that plaintiffs' claim is invalid because based upon the Tariff and the rules of the Lamberts Point Coal Exchange, not upon the Tariff alone. We quite agree with Judge Thompson, whose order is the subject-matter of the instant writ of error, when he points out in his opinion that, while certain substitutions of coal may have been made under the rules of the Exchange, the demurrage charges were assessed entirely on authority and by virtue of the Tariff. The substitution of cars of one member for those of another, a matter of bookkeeping, was by authority of the Coal Exchange agreement, but the charges sought to be recovered by plaintiff were assessed only under the Tariff provisions which provide for demurrage from the end of the free time until the coal was ordered out by the shipper. Such provisions have not been essentially affected by the fact that there was a substitution of cars among members of the Exchange, when the situation thereafter between the shipper and the railroad is the same as before substitution, in that the former continued to have title to an amount of coal equal to that originally shipped by him and the latter continued to have its cars detained, although not the identical cars, until the former ordered his coal unloaded.

The defendant below also seeks to avoid liability upon the demurrage claim of the plaintiff by a further contention to the effect that, under the facts disclosed by the pleadings, the Lamberts Point Coal Exchange was the actual consignee of the coal shipped, not the Emmons Coal Mining Company, and as such recovery of the demurrage charges must be from it, and not from the defendant. As stated, supra, the cars were consigned to the shipper himself, "care of the Lamberts Point Coal Exchange Pool." Where goods are consigned to one person in care of another, by the general rule the title to the goods is in the consignee. It is true, exceptions to the rule may exist, but no facts appear in the present record to bring the shipments of the Coal Company within the scope of such exceptions. The Coal Company, as a member of the Coal Exchange, submitted itself to certain regulations and granted certain powers to the Manager of the Exchange, but never actually parted with its title to, or power of control over, the amount of the coal it shipped. It cannot consistently shift its demurrage burdens to the Coal Exchange, if for no other reason, because of its specific agreement as a member of that Exchange. Rules 17 and 31 of the Coal Exchange are as follows:

"17. Members of the Exchange, for whose account coal is shipped to the piers, shall be responsible to the Norfolk & Western Railway Company for demurrage charges accruing for their account, and for the freight charges (when waybilled collect), and vessel loading

charges on coal unloaded into vessels for their account. Members shall file an agreement with the Railway Company as follows:

'I (or we) hereby agree to pay freight charges (when waybilled collect), and vessel loading charges on coal unloaded into vessels for my (or our) account on orders executed by the Manager of the Lamberts Point Coal Exchange, provided that bills for freight charges shall be so adjusted that they will not exceed the rates applicable on coal shipped to the piers for my (or our) account. The undersigned further agrees to pay any demurrage accruals under the tariff of the Railway Company, car days detention to be computed by subtracting the date of arrival of cars shipped for account of the undersigned from the date of release of equivalent cars.'"

* * * * * * *

"31. Car demurrage will be assessed by the Railway Company, on the average basis, for the account of individual shipper responsible. Detention will be computed by subtracting the date of arrival of cars shipped from date of release of equivalent cars. Credit car days of a member shipping in cars of the Lamberts Point Coal Exchange, shall not offset debits of another member."

The pleadings make it quite plain, apart from the evidence of the rules quoted, that no change of ownership, upon shipment of the coal, actually took place, and, as a necessary sequence, that no change of liability for proper demurrage occurred.

The defendants (below) have attacked the Tariff upon which the claim of the Railroad Company is based, and the practice of the Railroad Company thereunder, from still another angle. It will be remembered that the coal shipped by each member of the Coal Exchange was credited to him in the exchange when it passed Bluefield, West Virginia, and after being so credited he was entitled to at once order the withdrawal of an equal amount of coal from the Exchange, although his own coal would not actually be delivered at Lamberts Point for several days. This arrangement was made possible by the substitution clause of the Coal Exchange Rules. The defendants have pointed out that this practice enabled the Railroad Company to charge demurrage although no actual detention of its equipment beyond the free time had actually occurred. It is true, that when a shipper exercised his right to order an equal amount of coal out of the Pool as soon as his own coal had passed Bluefield, his order released cars in the Lamberts Point yard containing coal of another member of the Exchange, and there was no actual detention of equipment while his own cars were in transit to Lamberts Point.

In setting forth this phase of their case, defendants have attacked the Tariff as unreasonable. In considering the question of the reasonableness of the Tariff, we must not overlook the fact that the above practice was one which inured to the benefit of members of the Coal Exchange as well as the Railroad Company, as it enabled them to avoid the expenses incident to delays

of vessels awaiting arrival of the coal shipped, while it actually injured nobody, as demurrage was charged only from the date of arrival to the date the cars were ordered to be dumped, less the free time, as provided by Tariff. The shipper who had cars standing in the yard was not injured because another was allowed to substitute those cars for his own cars in transit. If there had been no power of substitution, demurrage would have been charged against his cars in just the same way.

The Interstate Commerce Commission had the Tariff under discussion in the instant case before it for consideration in the case of Smokeless Fuel Co. v. Norfolk & Western Railway Co., 85 I. C. C. Rep., 395. The issues there involved were the same as those involved here. The Commission held the Tariff and the practise of the Railroad Company thereunder to be reasonable and proper. We need not discuss the extent to which the decision of the Commission controls us, because we find ourselves in full accord with it.

The conclusion that no error existed in the judgment in so far as the main issues were concerned in effect disposes of that assignment of error relating to the refusal of the District Court to order the discovery of certain matters on the part of the Railway Company. The information sought was relevant and material only in case the Coal Company were correct in its contentions, hereinbefore discussed, regarding the Tariff and the application of it; and those contentions failing, the second assignment of error falls with them.

The judgment is affirmed.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

In Error to the District Court of the United States for the Eastern District of Pennsylvania

JUDGMENT—Filed Jan. 10, 1925

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, January 10, 1925.

Per Curiam:

Buffington, Circuit Judge.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

MANDATE—Filed Feb. 18, 1925

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania, Greeting:

Whereas, lately in the District Court of the United States for the Eastern District of Pennsylvania, before you or some of you, in a cause between Emmons Coal Mining Company and The Fidelity & Casualty Company of New York (defendants below) Plaintiffs in Error, and Norfolk & Western Railway Company (plaintiff below) Defendant in Error, a judgment was entered in the said District Court on the thirtieth day of April, 1924, which judgment is of record in the office of the Clerk of the said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof, as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Third Circuit by virtue of a writ of error agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

And whereas, in the term of October, in the year of our Lord one thousand nine hundred and twenty-four, the said cause came on to be heard before the said United States Circuit Court of Appeals on the said transcript of record and was argued by counsel:

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs; and that the said Defendant in Error, Norfolk & Western Railway Company, recover against the said Plaintiffs in Error, Emmons Coal Mining Company and the Fidelity & Casualty Company of New York, in the sum of twenty dollars ($20) for its costs herein expended, and have execution therefor;

Philadelphia, January 10, 1925.

You, therefore, are hereby commanded that such execution and further proceeding be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness, the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, at Philadelphia, the eighteenth day of February, in the year of our Lord one thousand nine hundred and twenty-five (1925).

Costs of Norfolk & Western Railway Co.:

Clerk	$....
Printing Record	....
Attorney	20.00
	$20.00

Saunders Lewis, Jr., Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ASSIGNMENTS OF ERROR—Filed April 8, 1925

And now, to-wit this seventh day of April, A. D. 1925, come Emmons Coal Mining Company and the Fidelity & Casualty Company of New York, plaintiffs-in-error in the above numbered and entitled cause, and in connection with their Petition for a Writ of Error in this cause assign the following errors which plaintiffs-in-error aver occurred in the said proceeding and upon which they rely to reverse the judgment entered herein as appears of record.

1. The Circuit Court of Appeals for the Third Circuit erred in sustaining the action of the United States District Court for the Eastern District of Pennsylvania in over-ruling the defendants' Affidavit of Defense raising questions of law as follows:

"The defenses of law are held insufficient and are over-ruled with leave to the defendants to file Affidavits of Defense on the merits."

2. The Circuit Court of Appeals for the Third Circuit erred in sustaining the action of the United States District Court for the Eastern District of Pennsylvania in discharging and refusing to make absolute defendants' rule to show cause why the plaintiff should not furnish the defendants certain information necessary to state their defenses as follows:

(A) With respect to Pools Nos. 5, 6, 7 and 39 in the Lamberts Point Coal Exchange:

1. The number of cars in each of said pools at the beginning of each day during the period for which demurrage is claimed in said statement of claim.

2. The number of cars of coal received in each of said pools for each day, during the said period.

3. The number of cars of coal dumped from each of said pools each day, during said period.

4. The total amount of credits in terms of cars held by all members of the Exchange in each of said pools for each day of said period.

5. The total number of car demurrage days charged, with respect to each of said pools, on each day during said period.

3. The Circuit Court of Appeals for the Third Circuit erred in sustaining the action of the United States District Court for the Eastern District of Pennsylvania in refusing to discharge and in making absolute plaintiff's rule for judgment for want of a sufficient Affidavit of Defense.

4. The Circuit Court of Appeals for the Third Circuit erred in sustaining the action of the United States District Court for the Eastern District of Pennsylvania in sustaining plaintiff's rule for judgment or want of a sufficient Affidavit of Defense.

5. The Circuit Court of Appeals for the Third Circuit erred in sustaining the action of the United States District Court for the Eastern District of Pennsylvania in directing the entry of judgment for the plaintiff for want of a sufficient Affidavit of Defense.

6. The Circuit Court of Appeals for the Third Circuit erred in sustaining the action of the United States District Court for the Eastern District of Pennsylvania in entering judgment in favor of the plaintiff and against the defendant.

7. The Circuit Court of Appeals for the Third Circuit erred in sustaining the action of the United States District Court for the Eastern District of Pennsylvania in failing to discharge plaintiff's rul- for judgment for want of a sufficient Affidavit of Defense.

8. The Circuit Court of Appeals for the Third Circuit erred in affirming the judgment of the District Court of the United States for the Eastern District of Pennsylvania herein.

Conlen, Acker, Manning & Brown, Attorneys for the Emmons Coal Mining Company. William G. Wright, J. T. M., Jr., Attorneys for The Fidelity & Casualty Company of New York.

[File endorsement omitted.]

Copy

In United States Circuit Court of Appeals

[Title omitted]

Petition for Writ of Error—Filed April 8, 1925

To the Honorable the Judges of the said Court:

And now, to wit, this 7th day of April, A. D. 1925, come Emmons Coal Mining Company and The Fidelity & Casualty Company of New York, by their attorneys, and respectfully show that on the 10th day of January, A. D. 1925, this Court entered an order or decree affirming a judgment against your petitioners and in favor of the Norfolk & Western Railway Company, which was a final judgment entered on April 30th, A. D. 1924, by the United States District Court for the Eastern District of Pennsylvania.

Your Petitioners feeling themselves aggrieved by the said order and decree entered herein as aforesaid, herewith petition the Court for an order allowing them to prosecute a writ of error to the Supreme Court of the United States, under the laws of the United States in such cases made and provided.

Wherefore, the premises considered, your Petitioners pray that a writ of error do issue, that an appeal in this behalf to the Supreme Court of the United States aforesaid, for the correction of the errors complained of and herewith assigned, be allowed, and that an order be made, fixing the amount of security to be given by the Plaintiffs-in-Error, conditioned as the law directs, and upon giving such bond as may be required, that all further proceedings may be suspended until the determination of said writ of error by the Supreme Court of the United States.

Conlen, Acker, Manning & Brown, Attorneys for Emmons Coal Mining Company. William G. Wright, J. T. M., Jr., Attorney- for The Fidelity & Casualty Company of New York.

In United States Circuit Court of Appeals

Order Allowing Writ of Error—Filed April 8, 1925

And now, to wit, this 8th day of April, A. D. 1925, the prayer of the within Petition is granted. The amount of bond is fixed at $5,000.00.

Buffington, J.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

STIPULATION OF COUNSEL RE BOND—Filed April 8, 1925

And now, to wit, this 3rd day of April, A. D. 1925, it was stipulated and agreed, by and between the attorneys for the respective parties hereto, that in lieu of the usual supersedeas bond, a bond be entered in the usual form of supersedeas bond by Emmons Coal Mining Company, as Principal, with a qualified surety company as Surety, in the amount of $5,000.00, and that the Court; in allowing the writ of error herein, be requested to fix the bond in that sum.

J. Hamilton Cheston, F. M. Rivinus, Attorneys for Plaintiff. Conlen, Acker, Manning & Brown, Attorneys for Emmons Coal Mining Company, Defendant. William G. Wright, J. T. M., Attorney for the Fidelity & Casualty Company of New York, Defendant.

[File endorsement omitted.]

BOND ON WRIT OF ERROR FOR $5,000—Approved and filed April 8, 1925; omitted in printing

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IN UNITED STATES CIRCUIT COURT OF APPEALS

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, *set:*

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this Court in the case of Emmons Coal Mining Company and The Fidelity & Casualty Company of New York, Plaintiffs in Error, and Norfolk & Western Railway Company, Defendant in Error, No. 3181, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 9th day of April in the year of our Lord one thousand nine hundred and twenty-five and of the Independence of the United States the one hundred and forty-nine.

Saunders Lewis, Jr., Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals, Third Circuit.)

IN UNITED STATES CIRCUIT COURT OF APPEALS

WRIT OF ERROR

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you between Emmons Coal Mining Company, and The Fidelity & Casualty Company of New York, Plaintiffs-in-Error, and Norfolk & Western Railway Company, Defendant-in-Error, a manifest error hath happened, to the great damage of the said plaintiffs-in-error, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 8th day of April, in the year of our Lord one thousand nine hundred and twenty-five.

Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals for the Third Circuit. (Seal United States Circuit Court of Appeals, Third Circuit.)

Allowed by Buffington, Circuit Judge.

CITATION—In usual form, showing service on F. M. Rivinus et al.; omitted in printing

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Endorsed on cover: File No. 31,046. U. S. Circuit Court of Appeals, Third Circuit. Term No. 367. Emmons Coal Mining Company and The Fidelity & Casualty Company of New York, plaintiffs in error, vs. Norfolk & Western Railway Company. Filed April 17th, 1925. File No. 31,046.

DEC 6 1

No. 70.

IN THE

Supreme Court of the United States

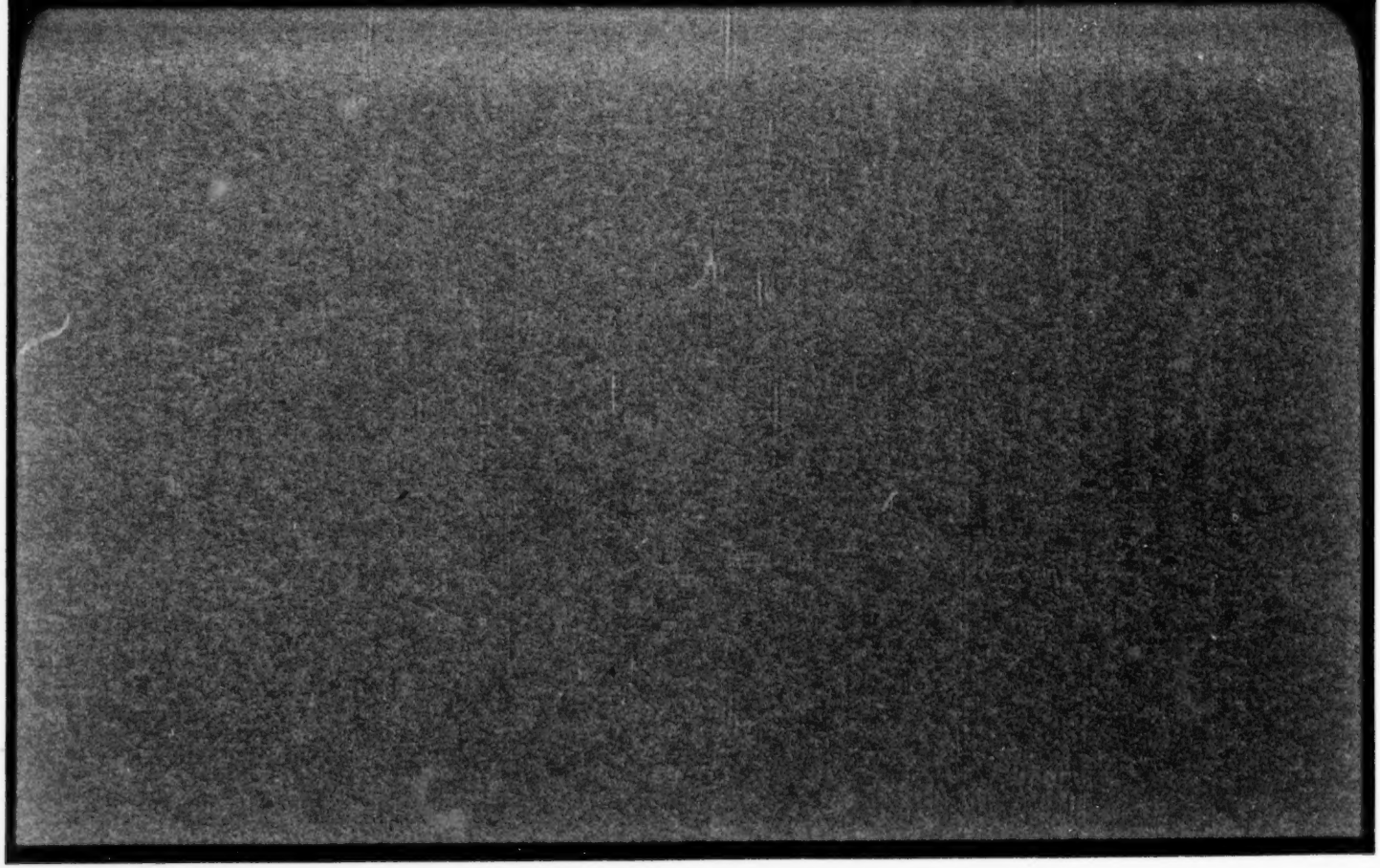
EMMONS COAL MINING COMPANY AND THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, Plaintiffs in Error,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR AGAINST SUPERSEDEAS OR ADVANCEMENT OF CAUSE.



In the Supreme Court of the United States.

OCTOBER TERM, 1926. No. 70.

Emmons Coal Mining Company and the Fidelity and Casualty Company of New York, Plaintiffs in Error,

vs.

Norfolk and Western Railway Company, Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

SUPPLEMENTAL NOTE OF ARGUMENT AGAINST SUFFICIENCY OF ASSIGNMENTS OF ERROR.

Without objecting to the failure of plaintiff in error to file with the Clerk of this Court "a definite statement of the points on which he intends to rely and of the parts of the record which he thinks necessary for the consideration thereof" (Rule 11, subdivision 9), and without objecting to his failure to serve his brief upon opposing counsel until the sixth instant (see Rule 25, sub-

division 1, the case being in the call for argument on the eighth instant), attention of this Court is directed to the generality of the assignments of error—see Transcript of Record, pages 182 and 183, and assignments of error relied upon at page 3 of brief on behalf of plaintiffs in error.

The assignment of errors required by Revised Statutes, Section 997, must "set out separately and particularly each error asserted" (Rule 8).

This case below was tried on the pleadings. The declaration of the Railway Company, called in the Pennsylvania practice a statement of claim, was met by Emmons' affidavit of defense raising questions of law, which amounts to a demurrer to the declaration, and his separate affidavit of defense setting up facts. The District Court having overruled Emmons' demurrer, the Railway Company filed its motion for judgment for want of a sufficient affidavit of defense of facts, specifying particularly the insufficiency, as the state practice requires. Upon this record the District Court after argument entered final judgment on the motion, and the Circuit Court of Appeals affirmed. In substance the assignments relied on do no more than assert that the District Court erred in overruling Emmons' demurrer to the declaration and in sustaining the Railway Company's rule for judgment for want of a sufficient affidavit of defense, and that the Circuit Court of Appeals erred in affirming.

In *Van Stone* vs. *Stillwell, etc. Mfg. Co.*, 142 U. S. 128, this Court held insufficient a group of general assignments, including an assignment for that the Court below "erred in overruling the demurrer to the evidence." In the present case the demurrers were on the pleadings, but in the case cited this Court quoted with approval from *Saydam* vs. *Williamson*, 61 U. S. 427, to the effect that demurrer to the evidence is regarded "in general as analogous to a demurrer upon the facts alleged in pleading." So, also, in *Grand Trunk Ry. Co.* vs. *Ives*, 144 U. S. 408, the assignment asserted error in refusal to charge generally for the Railway Company that under the evidence there was no right of recovery. The Michigan Death Statute, under which the Ives case was brought, as construed by the State Court, gave right of action only when the decedent left some one dependent on him for support. The general assignment of error was held not sufficiently specific to raise the question of whether there was sufficient evidence that decedent left any dependents, as required by the State Statute.

Respectfully submitted

J. HAMILTON CHESTON,
F. M. RIVINUS,
THEODORE W. REATH,
Attorneys for Norfolk and Western Railway Company, Defendant in Error.

PHILADELPHIA, DECEMBER 8, 1926.

FILED
DEC 6 1926
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

No. 70. **October Term, 1926.**

EMMONS COAL MINING COMPANY and THE FIDELITY & CASUALTY COMPANY OF NEW YORK,
Plaintiffs-in-Error,

v.

NORFOLK & WESTERN RAILWAY COMPANY,
Defendant-in-Error.

IN ERROR TO THE CIRCUIT COURT OF APPEALS OF THE THIRD CIRCUIT.

Brief on Behalf of Plaintiffs-in-Error.

ACKER, MANNING & BROWN,
Attorneys for Emmons Coal Mining Company.

WILLIAM G. WRIGHT,
Attorney for The Fidelity & Casualty Company of New York.

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IN THE

Supreme Court of the United States.

October Term, 1926. No. 70.

EMMONS COAL MINING COMPANY AND THE FIDELITY & CASUALTY COMPANY OF NEW YORK,

Plaintiffs-in-Error,

v.

NORFOLK & WESTERN RAILWAY COMPANY,

Defendant-in-Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF PLAINTIFFS-IN-ERROR.

ABSTRACT OF THE CASE.

This is an appeal from a judgment of the Circuit Court of Appeals of the Third Circuit affirming the decision of the District Court of the United States for the Eastern District of Pennsylvania (Thompson, *D. J.*), making absolute a rule for judgment for want of a sufficient affidavit of defense.

The action was instituted by the Norfolk & Western Railway Company as plaintiff against the Emmons Coal Mining Company as principal, defendant, and The Fidelity & Casualty Company of New York as surety on the bond of the Emmons Company,

to recover certain demurrage alleged to have accrued at the Lambert's Point coal piers of the plaintiff railway in the course of interstate commerce.

The suit is based upon a tariff of the railway duly filed and published and the question between the parties is one of interpretation of this tariff.

The defendants first interposed affidavits of defense raising questions of law. These affidavits were dismissed by the Court below with leave to file affidavits of defense to the merits of the case.

The defendants then filed a petition for a rule to show cause why the plaintiff should not be required to furnish to the defendant certain information necessary to state their defenses and which was alleged to be within the exclusive possession and control of the plaintiff.

As to part of this information the rule was made absolute. As to the balance it was dismissed. To this dismissal error is argued.

The defendants then filed affidavits of defense to the merits of the case, admitting a certain amount due and denying liability as to the balance.

The amount admitted to be due was paid.

The plaintiff then took rules for judgment for the balance as to which it claimed the affidavit was insufficient and these rules were made absolute. The damages were assessed by the clerk and judgment was entered.

This judgment was affirmed by the Circuit Court of Appeals and these proceedings were then brought to secure a review by this Court.

STATEMENT OF QUESTIONS INVOLVED.

The questions thus raised are the following:

1. Can a common carrier in interstate commerce in applying a demurrage tariff ignore a provision of the filed tariff operating to the benefit of the shipper, and incorporate rules and regulations of a coal exchange, not filed or published as required by the Interstate Commerce Act, to the detriment of a shipper?

2. Can a common carrier in interstate commerce under a tariff providing only for demurrage for the detention of cars, charge and collect demurrage on the basis of the shipper's credit in a pool in a coal exchange, regardless of actual detention of cars?

3. Is it error for the trial Court to refuse, on proper petition, to require the plaintiff to disclose information and facts material and relevant to the statement of the defense of the defendant, and which are within the exclusive possession and knowledge of the plaintiff and cannot be obtained by the defendant otherwise?

ASSIGNMENTS OF ERROR RELIED UPON.

1. The Circuit Court of Appeals for the Third Circuit erred in sustaining the action of the United States District Court for the Eastern District of Pennsylvania in overruling the defendants' affidavit of defense raising questions of law as follows:

> "The defenses of law are held insufficient and are overruled with leave to the defendants to file Affidavits of Defense on the merits."

. . . . . .

3. The Circuit Court of Appeals for the Third Circuit erred in sustaining the action of the United States District Court for the Eastern District of Pennsylvania in refusing to discharge and in making absolute plaintiff's rule for judgment for want of a sufficient affidavit of defense.

4. The Circuit Court of Appeals for the Third Circuit erred in sustaining the action of the United States District Court for the Eastern District of Pennsylvania in sustaining plaintiff's rule for judgment for want of a sufficient affidavit of defense.

5. The Circuit Court of Appeals for the Third Circuit erred in sustaining the action of the United States District Court for the Eastern District of Pennsylvania in directing the entry of judgment for the plaintiff for want of a sufficient affidavit of defense.

6. The Circuit Court of Appeals for the Third Circuit erred in sustaining the action of the United States District Court for the Eastern District of Pennsylvania in entering judgment in favor of the plaintiff and against the defendant.

7. The Circuit Court of Appeals for the Third Circuit erred in sustaining the action of the United States District Court for the Eastern District of Pennsylvania in failing to discharge plaintiff's rule for judgment for want of a sufficient affidavit of defense.

8. The Circuit Court of Appeals for the Third Circuit erred in affirming the judgment of the District Court of the United States for the Eastern District of Pennsylvania herein.

ARGUMENT.

Upon the original submission of this case to the District Court, that Court in its opinion (287 Fed. Rep. 168) said:

> "When the tariff is filed or published, it becomes the law between the shipper and the carrier until the Interstate Commerce Commission has, upon the complaint of the shipper, determined what are the just and reasonable rates to be charged. Meanwhile, the carrier is prohibited from departing from the tariff or collecting any other charges than those therein contained."

The tariff here involved provides for the payment of $2 per day for each day (after the expiration of free time), that a car of the railroad is held idle because of the failure of the shipper or consignee to unload it. On its face and in almost every provision of it the tariff specifies that the charge made is one for detention of equipment. It is entitled, "Demurrage Rules and Regulations governing *cars* containing coal."

Rule 1 of the tariff is entitled "*Cars* subject to Rules" and provides that *cars* containing coal shall be subject to these rules. Rule 2 with respect to free time, allows an average of five days *per car* free time. Rule 3, covering the computation of time, provides that notice shall be sent to the consignee upon the arrival of *cars*. Section (b) under Rule 3 says, "*A car* shall be considered as released." Paragraph 1 of Section (b) of Rule 3 provides that *cars* shall be released when the coal is dumped into a vessel "except that when *cars* are unloaded before the vessel registers such *cars* shall be released when unloaded." Paragraph 2 under Section (b) Rule 3, provides for substitution of *cars* as a convenience to the railroad. Paragraph 3 under said Section (b) of Rule 3, provides that the dates when shipments are transferred to another party

shall be considered the date "of release of the *car.*" Rule 4 provides "Settlement shall be made on the basis of *detention to all cars* released during the month."

More complete and absolute declaration that detention of cars is the sole basis of the charge could scarcely be conceived.

Yet the statement of claim nowhere contains a single allegation, claim or suggestion that the plaintiff-in-error ever detained a single car one day over the free time allowed by the tariff.

The breach alleged is to be found in paragraph 6 and is

> "The Railway Company avers that the Coal Company failed to dispose of the coal so consigned to the Coal Company or its equivalent within the free time provided by the Tariff, whereby demurrages accrued under the Tariff referred to above" and for the details refers to Exhibits "C" to "H," both inclusive.

This does not allege any breach of the obligation set forth in the tariff, namely, to pay for *detention of cars.*

The Lambert's Point Coal Exchange Rules show that the practice was not to hold a member's cars until he unloaded them, but to unload the first available cars for the benefit of any member who had started similar coal rolling from the mines.

Exhibits "C" to "H" (Record, pp. 27-85), do not establish the detention of any equipment. These exhibits are made up on forms not designed with reference to exchange operation but merely to be used in connection with the calculation of demurrage due by individual consignees and are therefore somewhat misleading when used in the present connection.

Take the first page of the Exhibit "C" (Record,

p. 27), as an example. It was conceded at the oral argument that the date of "September 11th" in column "C" headed "Date Unloaded" refers merely to the date when the steamer in question finished loading and does not show the date when the particular cars listed on the same page were actually dumped and does not enter into the computations by which the amount here claimed is reached. That the date has no reference to the actual unloading of the cars is clear from the fact, also appearing from this exhibit, that one of these cars did not arrive until September 27 or sixteen days after the date shown for its dumping.

The significant thing about these exhibits is that columns "A," "B" and "K," which would furnish information which is necessary to a computation under the tariff are not filled in at all. It is impossible from these statements to tell when the car originally consigned for the account of the defendant was dumped, and it is also impossible to tell what substituted tonnage was dumped, or when either the original or substituted tonnage was dumped.

In other words there is absolutely nothing anywhere in the statement of claim that permits of a calculation of demurrage upon any of the bases provided by the tariff.

From these facts it is clear that the statement of claim wholly fails to disclose any breach of any enforceable obligation.

The demurrage charges collectible under the demurrage tariff (Exhibit "A," Record, pp. 15-16), are coextensive with the amount of detention accrued under the tariff by the respective cars involved. We refer to Rule 4 which is in terms as follows:

> "Rule 4. Demurrage charges. Settlement shall be made on the basis of *detention to all cars* released during the months."

The amount of demurrage charged must therefore be based on actual car detention—detention of the physical equipment of the railroad over the free time allowed by the tariff which specifically provides how the detention chargeable against each car shall be determined. We again refer to Rule 4 of the demurrage tariff which is in terms as follows:

> "The date of arrival notice shall be subtracted from the date of release."

The detention of each car is thus determined.

Rule 3 (b) of the tariff provides the method of determining the date of release.

It is thus seen that the tariff specifically provides for the determination of each of the factors entering into the computation of the detention accrued by each car and makes such detention the basis of the demurrage charges authorized by the tariff.

The statement of claim contains as Exhibits "C" to "H," inclusive, the demurrage bills involved in this case.

The claim as to many of the cars involved is admitted and paid. This admission took out of this case the demurrage assessed on all cars left standing on track belonging to the plaintiff-in-error which should have been dumped into boats loaded by it and which could have been dumped into its boats, and all cars which arrived at the piers too late to be dumped into the boats of the plaintiff-in-error.

The demurrage bills show that the detention on these cars was computed from the date of arrival notice to the date the other cars were dumped in their stead into defendant's vessels.

The tariff (Exhibit A) provides that such cars in whose stead equivalent cars were dumped, are released as of the date they should have been dumped—or stated

differently, are released as of the date upon which the equivalent tonnage was dumped.

It is manifest, therefore, that as to the cars covered by this admission the releasing date upon which the detention relative thereto is computed is in accordance with the tariff. The detention on these cars and the consequent demurrage being in accordance with the tariff, necessarily there is no defense thereto.

Our quarrel is with the railroad's computation of detention as to certain cars which are set up in detail in Exhibit "1," "a" to "w" (Record, pp. 142-158), to the affidavit of defense and described in paragraph six thereof (Record, p. 135). Each of these cars is a car which was dumped into some other shipper's boat prior to the time that the plaintiff-in-error's vessel registered.

As to these cars it is denied that the demurrage is based upon detention figured in accordance with the tariff. The issue now before the Court is, therefore, narrowed to the specific question of how shall the detention be computed under this tariff on these cars that were unloaded into someone else's vessel prior to the time the plaintiff-in-error's own vessels were loaded.

We submit that under the tariff these cars are released as of the dates when they were actually dumped. On the demurrage bill the detention is computed from the date of arrival notice to the date the plaintiff-in-error dumped an equivalent amount of tonnage instead of only to the date the car was actually unloaded.

By Rule 4 of the tariff the detention is to be arrived at by subtracting the date of arrival notice from the date of release. There is no question about the date of arrival notice. The solution, therefore, of the question presented must be found within the four cor-

ners of the releasing rule of the tariff; *i. e.*, Rule 3 (b) reading as follows:

> "(b) A car shall be considered as released:
>
> "1. At the time vessel registers for the cargo or fuel supply of which the coal, coal briquets or coke dumped into such vessel is a part, except that when cars are unloaded before the vessel registers such cars shall be released when unloaded.
>
> "2. To avoid delay that would be entailed in switching out and delivering on shipper's order, in actual sequence of arrival, cars containing the same grade of coal, as indicated by the identifying consigning names or numbers of the waybills, the dates on which cars should have been so released (as indicated by the record) will be substituted for the dates on which equivalent tonnage was actually delivered and the detention will be computed on the basis of such substituted dates.
>
> "3. The dates shipments are transferred by written order and acceptance to another party shall be considered the date of the release of the car for the account of the original consignee and subsequent detention shall be charged in the account of the new consignee without any free time allowance.
>
> "4. Any fraction of a day will be computed as one day."

As the cars remaining in question were dumped before the plaintiff-in-error's vessels registered, they were not dumped into its boats and could not, therefore, be released under the first clause of paragraph 1 of Rule 3 (b). The second clause of paragraph 1 of Rule 3 (b), however, is directly applicable and provides:

> "When cars are unloaded before the vessel registers, such cars shall be released when unloaded."

We contend that the tariff in this particular is clear and unambiguous and directly applicable to the

cars in question. It is the railroad's tariff and as such is to be construed against it.

These cars in each instance were unloaded before the plaintiff-in-error's vessel registered, and therefore come clearly within the second clause of paragraph 3 (b) 1, and were accordingly released "when unloaded."

Exhibit 2 of the affidavit of defense shows that if the detention as to these cars is computed from the date of their notice of arrival to the date they were unloaded, the demurrage thereon with full demurrage claimed on all of the other cars as computed by the railroad and as admitted to be correct, amounts in all to $3862. This we submit is the whole amount to which defendant-in-error is entitled under its tariff—and this plaintiff-in-error paid.

Paragraph 2 of the releasing clause of the tariff cannot operate to extend the length of time for which demurrage shall be charged. It manifestly cannot apply to these cars that are unloaded before plaintiff-in-error's vessel registered, because it applies to those cars only as to which it is desired to avoid delay in switching and delivering on shipper's order in actual sequence of arrival.

The cars now in dispute were all unloaded prior to the time the plaintiff-in-error's vessels were being loaded and therefore no delay with respect to them could be entailed in switching and delivering at or after such time, because they were not present in the yards to be switched or delivered on our order in actual sequence of arrival.

The railroad's contention throughout this litigation has been that paragraph 2 of the releasing rule provides that when plaintiff-in-error's cars are dumped into some other shipper's boat, such cars are not released until plaintiff-in-error dumps equivalent coal. But the railroad cannot point to any provision in paragraph 2 of Rule 3 (b) that says that cars of a par-

ticular shipper which are dumped into boats of other shippers, are not released from demurrage until the shipper owning the coal in such cars orders equivalent coal to be dumped.

These cars which were dumped into boats of other shippers before our vessels registered, were so dumped because they were more conveniently placed for unloading into such vessels than the cars of the respective shippers whose boats were then being loaded. But in all such instances our cars were thus dumped and the cars of other shippers left standing on track or rolling, *not* "to avoid delay that would be entailed in switching out and delivering on shipper's order" (that is, on plaintiff-in-error's order), but solely for the benefit of the railway and these other shippers in the filling of the other shippers' orders.

The tariff must be applied individually against each shipper and the time of release of each of his cars must be determined under the tariff as to the loading of his individual vessels.

Paragraph 2 by its very language applies solely to the cars of a particular shipper as to which it is desired to avoid the delay incident to switching out and delivering them in the order of arrival, in the loading of his individual vessels. It is manifest, therefore, that it is the cars of these other shippers which were left standing on track, in whose stead our cars were dumped, to which paragraph 2 applies, as distinguished from our cars that were dumped.

Paragraph 2 releases the cars of these other shippers so left standing in the pools by substituting the *date* the respective car of the plaintiff-in-error was dumped in its stead, for the dates the cars of these other shippers were subsequently actually unloaded. There is not one word said in paragraph 2 about the releasing of plaintiff-in-error's cars that were dumped in place of the other shippers' cars, which in turn must

be released under some tariff provision. If paragraph 2 does not provide for their release, then the other paragraphs must be looked to for the releasing authority.

The contention of the railroad that paragraph 2 provides that the cars of the plaintiff-in-error dumped into boats of other shippers before the vessels of defendant registered, are not released until the plaintiff-in-error dumps an equivalent amount of coal, results in making paragraph 2 directly contradictory to clause 2 of paragraph 1, which provides that cars dumped before the registry of the vessel are released as of the date they were unloaded.

We maintain that the language of paragraph 2 is quite clear and needs no interpretation. If the language used is applied in its ordinary acceptation our position is completely justified. But certainly if interpretation is resorted to, is it not absurd to evolve an interpretation which is directly contradictory to other provisions of the same document, when on the face of the language there appears to be not the slightest conflict between the respective provisions?

Our position in this respect finds conclusive confirmation in the fact that this whole tariff, including paragraph 2, applies to shippers outside of the exchange just as much as to shippers in the exchange. It is the only demurrage tariff which the plaintiff had. There is not one word in the tariff indicating that it has any special reference to exchange members. There is no mention or even suggestion of the exchange in the tariff.

We submit, therefore, that nothing in paragraph 2 can apply to cars unloaded previously to the registry of the vessels and which, at the time of such registry, were not in the yards.

This brings us to the consideration of whether paragraph 3 of the releasing rule applies to the cars

unloaded before the plaintiff-in-error's vessels are registered. We submit that it does, in the alternative with the second clause of paragraph 1.

The cars of the plaintiff-in-error that were unloaded before its vessels registered must necessarily have been dumped into some other shipper's vessel or vessels. Any such dumping by the railroad without authority from the plaintiff-in-error constituted a conversion of the coal contained in such cars, and certainly would release the cars from demurrage for its account as of the date of actual dumping.

Nothing in the tariff gives the railroad the right to dump one shipper's coal for the account of another. Looking only to the tariff, such an act on the part of the railroad is a conversion. To get this right the railroad must necessarily rely upon the Articles of Organization and Rules of the Lambert's Point Coal Exchange, which contain in effect a written order from the members of the exchange to the railroad to transfer the coal of one shipper (by the act of dumping) to another. This was recognized by the District Judge, who, in his opinion, said:

> "By the terms of the Articles of Organization and Rules of the Exchange, the latter is to act as an agency for the purposes recited. . . . There is nothing in the Articles and the Rules divesting the members of property in their coal until under a member's order, coal consigned to his account is diverted to a vessel to fill the contract of another member having a credit for coal in the pool. The member therefore has the rights of a consignee until his blanket order has been executed. This is apparent because the blanket order is expressly revocable upon notice. His title is not divested therefore until his coal is used as equivalent for that to be delivered on the contract of another member."

If we understand the language of this Court as so expressed, it is that through the agency of the exchange there is a transfer of title from the shipper whose coal is dumped to the shipper into whose boat it is dumped. Except for such a transfer, the dumping by the railroad of the defendant's coal into some other shipper's vessel prior to the registering of the plaintiff-in-error's vessel is a conversion. If there is a transfer from the plaintiff-in-error to the shipper into whose boat the former's coal was dumped, then we submit that these cars which were dumped prior to the registry of plaintiff-in-error's vessels are released under paragraph 3 of the releasing rule as of the date they were unloaded because the transfer to such shipper became effective when the coal was so dumped.

Paragraph 2 is a *car releasing* rule. It has no alternative application with the other two car releasing rules. Paragraph 2 does not supersede paragraph 1 any more than it supersedes paragraph 3. Each of the paragraphs 1, 2 and 3 of Rule 3 (b) applies to particular cars as specified in the respective paragraphs, and provides how those cars to which it applies are released. Paragraph 1 applies to cars unloaded into the particular vessel or to cars unloaded before the particular vessel registered. Paragraph 2 applies to cars left standing on track which should have been dumped into the particular vessel in observance of the order of arrival and to cars which had passed the billing point, but which, because of railroad delays, did not arrive in time to be dumped into the particular vessel. Paragraph 3 applies to cars transferred from the original consignee and dumped into the vessel of another shipper.

Each of these releasing rules applies to a particular class of *cars* as just described. These rules apply to the respective *cars* no matter whether the consignee happened to be a member of the exchange or whether he was shipping outside the exchange. Many ship-

pers were moving coal over the railroad's Lambert Point piers who were not members of the exchange.

Apply paragraph 2 of the releasing rule to such a shipper. Say the particular shipper has 200 cars of pool 2 coal standing at the piers. Extra switching would be involved to deliver these cars in the order of their arrival and the shipper only wants to dump fifty cars. The railroad dumps the fifty cars last arrived instead of the fifty earliest arrived cars. There is no substitution of one shipper's cars for another. Nevertheless this rule of the tariff provides that the fifty earliest arrived cars are released as of the date the fifty cars actually dumped, were unloaded. There is no substitution of cars. There is simply a substitution of dates so that although the fifty earliest arrived cars still continue to stand on the tracks, they were nevertheless released upon the demurrage records so that the demurrage collectible on these cars is the same as if they had been actually unloaded. This releasing of these cars left standing from further demurrage charges is the concession which the railroad necessarily makes in order to be relieved from the switching that it would otherwise have had to do in order to deliver the cars in the order of their arrival.

The railroad can dump such a shipper's cars only into that shipper's boat except that it commit a conversion of his coal or else such shipper transfer such coal to some other shipper. If there is a transfer, then the coal is released as to the particular shipper under paragraph 3 of the releasing rule. It must be plain, therefore, that there is no substitution of cars provided for under the releasing rules of the tariff or under any other rule of this tariff.

Reference to the demurrage bill indicates that these cars of the plaintiff-in-error which were dumped into some other shipper's vessel before plaintiff-in-error's vessels registered, are not released on the demurrage

bill until the plaintiff-in-error ordered equivalent tonnage to be dumped. Although these cars had been unloaded and had gone on back to the mines for another load of coal, the plaintiff-in-error was nevertheless charged with detaining the car. During the period between the time that the car was actually unloaded and the time when the plaintiff-in-error ordered equivalent coal to be dumped, there was no unreleased car standing in the plaintiff's yards but the plaintiff-in-error had a credit for certain coal to its account on the books of the exchange. The detention, therefore, for which we are being charged in this respect is a book detention which is in no way dependent upon actual car detention.

If the tariff is the sole authority for the demurrage charge, then we ask what clause in the demurrage tariff authorizes the collection of a demurrage charge upon a book credit indicated on the books of the Lambert's Point Coal Exchange or any other exchange. The tariff provides but one basis for a demurrage charge and that is the *detention of a car*.

If the respective shippers composing the Lambert's Point Coal Exchange are to be assessed demurrage charges upon their respective book credits, instead of upon actual car detention, then it necessarily results from the privilege of dumping equivalent coal as soon as shipments have passed the billing point that the demurrage chargeable against exchange members will be considerably greater than if they had been shipping independently outside of the exchange. At the same time the carrier's operation in actual physical switching of cars, *et cetera*, is much less because all of the shippers shipping through the exchange were treated in the matter of operation as if they were one shipper.

For illustration, take a situation where there are thirty shippers members of the Lambert's Point Coal

Exchange and one shipper shipping outside of the exchange, and the one shipper shipping outside of the exchange ships as much tonnage as all of the members combined shipping through the exchange. Under the exchange arrangement the cars of all members shipping through the exchange were considered as belonging to one shipper in so far as the carrier operations are concerned. Any car of any member could be dumped into the boat of any other member. Therefore, there would be no more labor entailed in making any delivery of any car shipped through the exchange to a boat of a member of the exchange than that entailed in making a delivery of the one shipper's cars outside of the exchange to his boats. The service rendered by the railroad to the thirty members shipping through the exchange in the aggregate therefore is no greater and can be no greater than the service rendered by the railroad to the one shipper shipping outside the exchange.

The same demurrage tariff applies to both operations and granted that the performance was the same, the demurrage collectible from the members' exchange as a unit should not exceed the demurrage collectible from the individual shipper outside the exchange. It must be manifest, however, that if instead of computing the demurrage under the exchange operations against the exchange as a unit and then apportioning such net amount against the members of the exchange according to their individual performance, demurrage is assessed directly against the individual member of the exchange upon his individual book credits that the aggregate of demurrage so collectible will be greatly in excess of that for which the railroad has actually rendered service as measured by the amount chargeable against the shipper shipping outside of the exchange for an identical service.

This, we maintain, is exactly what results from the railroad's method of computing demurrage on our cars dumped before our vessels registered.

If it be held that the tariff warrants the computation of detention as billed by the plaintiff as to the cars in issue then the tariff is illegal and unenforceable within the principle laid down by this Court in the Forwarding Cases, *I. C. C. v. D. L. & W. Ry., et al.*, 220 U. S. 235.

The purpose of a forwarding company is to consolidate the less than carload shipments of several shippers into a carload lot and shipping them as a carload lot obtain thereon the carload rate which when divided between the participating shippers, makes as to each, a much less freight rate than they would have had to pay if each less than carload shipment had been forwarded individually. For the saving thus effected the forwarding company accepts a remunerative commission.

The railroads, in an effort to break up this practice, provided in their tariffs that shipments made by forwarding companies would have to be vouched for by a statement that the company in whose name the shipment was forwarded was the owner of the goods included therein. The Interstate Commerce Commission found that such provisions in the tariff were unreasonable. The Circuit Court enjoined the Commission's order on the ground that the railroad had the right in law to predicate its charges upon the ownership of the property transported. This Court in reviewing the pertinent issues involved said:

> "On their face, however, when ultimately reduced, they will be found, in so far as they are here susceptible of review, to rest on but a single legal proposition; that is, the right of a common carrier to make the ownership of goods tendered to him for carriage the test of his duty to receive

and carry; or, what is equivalent thereto, the right of a carrier to make the ownership of goods the criterion by which his charge for carriage is to be measured. We say the contentions all reduce themselves to this, because in their final analysis all the other differences, in so far as they do not rest upon the legal proposition just stated, are based upon conclusions of fact as to which the judgment of the Commission is not susceptible of review by the courts.

"The contention that a carrier, when goods are tendered to him for transportation, can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods, or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods, is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers, as to demonstrate the unsoundness of the proposition by its mere statement."

The doctrine of the Forwarding Company case is clear and unmistakable. A difference in transportation charge based on mere ownership where there is no difference inhering in the goods and the service is the same, is unlawful, and a question for the courts to determine and not simply an unreasonable tariff provision for the Interstate Commerce Commission to adjudicate.

We submit that here the carrier is attempting to do the identical thing which the carrier attempted to do in the Forwarding Cases, namely, predicate its transportation charges not upon the service rendered but upon the ownership of property. The demurrage charges here sought to be collected are predicated not upon the release of cars but upon book credits showing ownership of coal when the actual cars have been

dumped and returned to the mines—an unlawful discrimination between shippers in the exchange and those outside.

The argument of the railroad that the contention of the defendant as to the interpretation of the tariff might in some cases cause the dumping of one car to operate to release two cars from demurrage is immaterial. The railroad prepared the tariff, it is to be construed most strongly against the railroad, and if that is the proper construction, the railroad is answered by the fact that the tariff so provides.

The alternative is to adopt a construction contended for by the railroad which is even more objectionable in that the railroad's construction requires the charging of demurrage regardless of detention of equipment—an unheard of proposition which turns a demurrage tariff into a revenue measure enabling the railroad to charge demurrage as for detention of a car at the same time the car is actually carrying revenue freight.

We have so far omitted any reference to the rules and regulations of the Exchange because we have desired to submit this argument to the Court upon the authority which the District Court itself correctly pointed out in its decision as the only lawful basis of any demurrage charge in this case, namely, the filed tariff.

We submit that the filed tariff in no wise provides for the substitution of the car of one shipper for that of another and that it does not provide for the assessment of demurrage upon a car after that car has been unloaded. We readily agree that the rules of the Exchange do so provide and if the rules of the Exchange had been filed as tariffs, we would be face to face with the identical situation presented in the Forwarding Cases where the restrictive clauses were published as tariffs. If, however, this Court should hold that the

tariff comprehends the rules for arriving at detention such as set forth in the rules of the Exchange, then we respectfully submit that the whole arrangement is illegal upon the same principles of law under which this Court denied the legality of the Forwarding Company tariff restrictions.

The allegations on which the railroad builds its claim set out that a car shall be deemed released when its "*equivalent*" has been released. This language should not be confused with that used in paragraph 2 of Rule 3 (b) of the filed tariff where the word "*equivalent*" clearly applies to equivalent tonnage *standing in the name of the same shipper.* The meaning of the word "equivalent" as used in this statement of claim becomes apparent on reference to the various exhibits and is not the same.

Rules 30 and 31 of the Exchange show that the procedure followed by the railroad company in computing the demurrage was as follows:

All members consigned their coal to certain common pools. The pool classification depended on the grade of the coal. These members by the shipment of coal established credits to their accounts in the various pools and then from time to time withdrew coal against these credits.

By this procedure cars shipped by different shippers were released to the account of various members who were not, of necessity, consignees of the original shipper. This fact is borne out by a reference to Plaintiff's Exhibits (C, D, E, F, G, H, C-2, D-2, E-2, G-2, H-2 and I), where it appears that the railroad in making up its demurrage accounts does not trace the history of a car by consignees but by pool accounts.

It follows, therefore, for example, that A's five cars of coal may have arrived at Lambert's Point on June 1 and been dumped for B's account on June 5, while B's five cars may have arrived on June 16 and

been dumped for A's account on June 20. Following the method employed by the railroad A would be assessed demurrage charges from June 6 to June 20, whereas neither A's nor B's cars had earned demurrage because both sets of the cars were dumped within five days free time.

It is submitted that the mere statement of the above proposition conclusively demonstrates that the charge which the plaintiff in this case is seeking to collect is not a demurrage charge based upon the lawful tariff filed with the Interstate Commerce Commission. Nowhere does that tariff state that the railway company can compute its demurrage on any other basis than that of the actual detention of cars shipped by or consigned to this defendant.

It is therefore clear that the railway company is attempting in this action to collect a charge not in conformity with any tariff lawfully filed with the Interstate Commerce Commission, as the facts which it alleges and the exhibits which it sets out clearly show that this charge is assessed in conformity with certain rules and regulations of the Lambert's Point Coal Exchange, which differ materially from the lawful filed tariff, as pointed out above.

The articles of organization and the rules of the Lambert's Point Coal Exchange are not a tariff or a part of a tariff. They are not alleged to have been and were not filed or published as a tariff as required by the Interstate Commerce Act. The breach alleged is manifestly a breach of the arrangement provided for by these articles of organization and rules and in no way a breach of the tariff or any obligation arising out of the tariff by virtue of shipments made thereunder.

The tariff covers detention of railway equipment and that only.

There is no allegation anywhere to be found that any equipment was detained.

The averment of the statement is, that the plaintiff-in-error failed to dispose of the coal for which it got credit in the pool within the period of free time allowed.

This is a claim based merely upon a breach of the exchange agreement, not upon a breach of obligation arising from the tariff and is therefore clearly unenforceable.

Under the pooling arrangement, covered by the exchange agreement, any member could receive credit as soon as his coal passed the billing point on its way to tidewater and could immediately dump an equivalent tonnage. In other words if "A" had fifteen cars of coal and "B" thirty cars of coal, all just starting on demurrage, and "B" needed forty-five cars of coal to load a barge, he could start fifteen cars of coal rolling from the mines, immediately get credit therefor in the pool, and proceed to dump his thirty cars and "A's" fifteen cars, which fully released these cars and freed them for return movement of the mines. A week later the fifteen cars which "B" had started from the mines come into the exchange. Manifestly during this week no railroad equipment has been detained and yet "A," under the system of calculation adopted by the plaintiff in his statement of claim, would be charged with seven days' demurrage on fifteen cars for this period.

It is clear that the charge sought to be imposed upon the plaintiff-in-error in this case is a charge based solely on the length of time it had credit in the pool and is made entirely without reference to detention of car equipment, whereas, the only tariff which has any bearing applies only to the detention of equipment.

The charge sought to be enforced in this case is illegal and unenforceable in that the statement does not claim a recovery for a breach of the only obligation which it alleges.

At the oral argument in the court below counsel for the railroad endeavor to bridge this gap by referring to the provisions of Rule 3, Section (b), which provides,

> "To avoid delay that would be entailed in switching out and delivering on shipper's order, in actual sequence of arrival, cars containing the same grade of coal, as indicated by the identifying consigning names or numbers on the waybills, the dates on which the cars should have been so released (as indicated by the record) will be substituted for the dates on which equivalent tonnage was actually delivered and the detention will be computed on the basis of such substituted dates."

The Railroad argues that under this provision of the tariff it was entitled to compute demurrage on the basis used by it in this case and that as against this plaintiff-in-error is entitled to treat the cars shipped by it as being detained until such time as the plaintiff-in-error dumped an equivalent tonnage of coal, regardless of whose coal was finally dumped for plaintiff-in-error's account and regardless of whether the cars shipped by it or any other cars were detained for a single day.

To sustain this position, the railroad must do one of two things, either maintain that under this provision of the tariff without more, it is entitled to use the coal of one consignee to fulfill its obligation of delivering like coal to another consignee; a position obviously illegal and unsustainable; or else rely upon the Exchange Agreement as a part of its authority to make the charge. As soon as it takes this latter position,

the Railroad is immediately outside of the filed tariff and its claim becomes unenforceable.

This argument by the defendant-in-error also disregards the very significant fact that in the provisions of Rule 3 (b) (2) the singular possessive is the form used, *viz.*, "To avoid delay that would be entailed in switching out and delivering on *shipper's order*," etc.

This provision does not permit the substitution of one shipper's coal for that of another—and its operation when confined to the cars of one shipper could not result in his being charged for detention of equipment when none was detained. It cannot be cited to justify such demurrage as is here sought to be collected.

It is obvious that the argument made on this point by counsel for the railroad is wholly specious and unsound and cannot prevail.

That a court cannot entertain an action seeking to collect such charges is plainly evident from the words of the act itself and the decided cases.

Section 6 of the Interstate Commerce Act provides:

> "(1) That every common carrier subject to the provisions of this act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be car-

ried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, all other charges which the Commission may require, all privileges or facilities granted or allowed *and any rules* or regulations which in any wise change, affect, or *determine any part* or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee.

"(7) . . .; nor shall any carrier charge or demand or collect or receive a greater or less or *different* compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time, nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

That a demurrage charge is within the purview of this section is evident from many cases:

Berwind-White Coal Co. v. Chicago & Erie Railroad Company, 235 U. S. 371.

At page 375 the Court said:

"There are only two alleged Federal contentions:

"1. That allowing the demurrage conflicted with the act to regulate commerce because no tariff on the subject was filed or published. The fact is that the railroad had complied with the law as to filing tariff sheets, and had also, long before the time in question, filed a book of rules of the Chicago Car Service Association, of which it was a member, relating to liability for demurrage, and a few days after had written the Commission a

letter stating that the demurrage charge would be $1 per day."

Pennsylvania Railroad Company v. Kittaning Iron and Steel Company, 253 U. S. 632.

Southern Railway Company v. Prescott, 240 U. S. 362.

In the case of the Lehigh Valley R. Co. v. U. S. (C. C. A. 3d Cir., 1911), 188 Fed. 879, 110 C. C. A. 513, it was held that demurrage charges are a part of transportation and are required to be filed with the Interstate Commerce Commission. This case arose under Section 6 of the Interstate Commerce Act.

In the case of Michigan Central R. Co. v. Michigan Railroad Commission (1914), 183 Mich. 6, 148 N. W. 800, it was held that demurrage is a "terminal charge" within the meaning of Section 6 of the Interstate Commerce Act.

In the case of Wilson Produce Company v. Pennsylvania Railroad Company (1908), 14 I. C. C. 170, the Interstate Commerce Commission said:

> "Beyond all possibility of doubt, therefore, the duty of regulating terminal charges when related to interstate transportation has been lodged with the Interstate Commerce Commission and Federal Courts have so held."

In the case of Gault Lumber Co. v. Atchison etc. R. Co. (1913), 37 Okla. 24, 130 Pac. 291, the Court held that demurrage is "one of the other charges" mentioned in Section 6 of the Interstate Commerce Act.

That no circumstance whatsoever will justify a carrier in departing from the lawful tariff filed with the commission is most apparent from the words of Section 6, *viz.:*

> "Nor shall any carrier charge or demand or collect or receive *a greater or less or different com-*

> *pensation* . . . than the rates . . . specified in the tariff filed and in effect at the time, nor shall any carrier . . . extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

More imperative language can hardly be imagined, and the following cases unquestionably show the strict character of this provision, and that it is binding on the consignee as well as the carrier:

> Dayton Coal & Iron Co., Ltd. v. Cincinnati, New Orleans & Texas Pacific Railway Company and others, 239 U. S. 446.

The case arose on appeal from a bill in chancery asking an injunction against the carriers restraining them from prosecuting a suit to collect additional freight charges alleged to be in excess of the "true rate." It was further alleged that there was a binding contract for the transportation of freight at sixty cents. The carriers sought to collect ten cents additional as the lawful tariff.

In affirming the judgment of the Supreme Court of Tennessee dismissing the bill the Court said at page 451:

> "That it is essential to the maintenance of uniform rates and the avoidance of rebates and preferential treatment that the tariff rates filed with the Commission according to the Interstate Commerce Act, while in force, shall be the only rates which the carrier may lawfully receive or the shipper properly pay is too thoroughly settled by the former decisions of this court to require further discussion. The principle is stated and many previous cases in this court cited in a case decided at the last term. Louisville &c. N. R. Co. v. Maxwell, 237 U. S. 94, 97, 59 L. Ed. 853,

855, L. R. A. 1915E, 665, P. U. R. 1915C, 300, 35 Sup. Ct. Rep. 494."

Southern Railway Company, Plaintiff-in-error v. W. E. Prescott, 240 U. S. 632.

This was an action to recover for the loss of boxes of shoes which were destroyed by fire, on July 4, 1913, while in the possession of the Southern Railway Company. Tariffs provided "property not removed by the party entitled to receive it within forty-eight hours after notice of its arrival," subject to carrier's responsibility as warehouseman only. Consignee paid the freight charges and "accepted the freight," and the railroad had the consignee's receipt for the goods. A few boxes were removed and the remainder left to suit the consignee's convenience.

In deciding that the Federal rule as to the liability of a warehouseman was the proper rule to apply inasmuch as the goods were still in interstate commerce and the terminal charges therefore subject to Section 6 of the Interstate Commerce Act, the Court said at page 638:

> "It is also clear that, with respect to the service governed by the Federal statute, the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates (Texas & P. R. Co. v. Mugg, 202 U. S. 242, 60 L. ed. 1011, 26 Sup. Ct. Rep. 628; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 652, 57 L. ed. 683, 688, 33 Sup. Ct. Rep. 391; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 112, 58 L. ed. 868, 876, L. R. A. 1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593; Louisville & N. R. Co. v. Maxwell, 237 U. S. 94, 59 L. ed. 853, L. R. A. 1915E, 655, P. U. R. 1915C, 30, 35 Sup. Ct. Rep. 494), and the established principle applies equally to any Stipulation attempting to alter the provisions as fixed by the published rules relating to any of the services

within the purview of the act . . . No carrier may extend 'any privileges or facilities,' save as these have been duly specified. And as the terminal services incident to an interstate shipment are within the Federal Act, and the conditions of liability while the goods are retained after notice of arrival are stipulated in the bill of lading under the filed regulations, the conditions thus fixed are controlling, and the parties cannot substitute therefor a special agreement."

Louisville & Nashville Railroad Co. v. Maxwell, 237 U. S. 94.

This was an action by the carrier to collect an alleged undercharge. Defendant-in-error after repeated interviews and correspondence with the representatives of the Louisville & Nashville Railroad Company as to rates on certain round trip tickets purchased two of such tickets to Salt Lake City. At the time he could have gone to Salt Lake City and return at the rates mentioned, but by another route, and he was in no way at fault in the matter. The Court said at page 97:

"Under the interstate commerce act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted under any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."

Judgment in favor of the defendant-in-error reversed.

In Chicago & Alton Railroad v. Kirby, 225 U. S. 155, the Court said at page 165:

> "An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be published in the tariffs; and for a breach of such a contract, relief will be denied, because its allowance without such publication is a violation of the act."

Mr. Justice White, in the case of N. Y., N. H. & H. R. Co. v. I. C. C., 220 U. S. 361, 391, 50 L. Ed. 515, 521, used this language:

> "The all-embracing prohibition against either directly or indirectly charging less than the published rate shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind its meaning becomes, if possible, clearer."

This language was approved in the case of Armour Packing Co. v. U. S., 209 U. S. 56, 52 L. Ed. 681.

In Poor Grain Co. v. Railroad, 12 I. C. C. Rep. 418, Commissioner Harlan, speaking for the Commission, said:

> ". . . this published rate is as fixed and unalterable either by the shipper or by the carrier as if that particular rate had been established by a special act of the Congress."

In St. Louis S. W. Ry. Co. of Texas v. Spring River Stone Co. (169 Mo. App. 109, 154 S. W. 465) the carrier sued to collect freight under a rate which was not in the tariffs filed with the Interstate Commerce Commission.

The Court held that the rate fixed by the tariffs filed with the Interstate Commerce Commission is

binding both on shipper and carrier, and that a carrier cannot contract either directly or indirectly for any other rate, or recover on a rate not in the filed tariffs.

Sturgis, *J.*, in his concurring opinion, said:

> "The Interstate Commerce Act deprives carriers and shippers of the power to make individual contracts by substituting a uniform contract filed with the Commission."

Again, after quoting the provisions of Section 6 of the Interstate Commerce Act, the Court says:

> "This means that common carriers shall not give or grant to any shipper any rate other than the established published rate. *They shall not do so for any purpose or in any manner. They shall not do so directly or indirectly. They shall not do so by contract, compromise, or settlement.* C. & A. Railroad v. Kirby (1912), 225 U. S. 165, 52 Sup. Ct. 648, 56 L. Ed. 1033." (Italics ours.)

Edenton Cotton Mills v. Norfolk So. Co., 100 S. E. 341 (N. C.).

This case holds that an agreement for an interstate shipment at a rate other than that contained in the filed tariffs of a carrier is illegal, even though the rate was misquoted to the shipper.

The Court says:

> "The principle is firmly settled that the only rate is the rate fixed by the Interstate Commerce Commission and published, and no contract, agreement or understanding between the parties can change it."

In N. Y., N. H. & H. R. Co. v. York & Whitney Co., 215 Mass. 36, 102 N. E. 366, a lawful rate established by the tariff filed and published was not collected. The consignee was allowed to recover difference between freight paid and freight due under filed tariffs.

The Court said:

"The railroad and the shipper are bound inexorably to follow the rate published. . . . Mistake, inadvertence, honest agreement and good faith are alike unavailing. . . . The rate when published becomes established by law. It can be varied only by law, and not by act of the parties. The regulation by Congress of Interstate Commerce rates takes that subject out of the realm of ordinary contract in some respects, and places it upon the rigidity of a quasi-statutory enactment."

In Smith v. Great Northern Ry. Co., 15 N. Dak. 195, goods were billed first class and the consignees contended a third class rate should apply. The sole question was one of classification.

The Court said:

"All contracts entered into with common carriers are presumed to be governed by the classification sheet in force at time of shipment. Whether such classification is just or unjust it is, nevertheless, binding, both upon the common carrier and the shipper, so long as the same remains in force. *The tariff thus fixed must govern regardless of any contract for a greater or less rate.*"

In Moore v. Duncan, 237 Fed. 780 (C. C. A., 6th Cir., 1916), the Court said:

"A published tariff, so long as it is in force, has the effect of a statute and is binding on carrier and shipper."

Other cases in the same tenor are:

Alabama G. S. R. Co. v. Geo. H. McFadden & Bros., 232 Fed. 1000 (D. C., E. D. Pa., 1916);

American Sugar Refining Co. v. D. L. & W. R. R. Co., 207 Fed. 733;

E. E. Taenzler & Co. v. Chicago R. I. & P. Co. (C. C. A., 6th Cir., 1911), 191 Fed. 543;

L. & N. R. R. Co. v. Dickerson (C. C. A., 6th Cir., 1911), 191 Fed. 705;
C. B. & Q. R. R. Co. v. Feintuch (C. C. A., 9th Cir., 1911), 191 Fed. 482;
Atlanta, K. & N. Ry. Co. v. Herne, 106 Tenn. 73, 59 S. W. 134 (Tenn. 1900);
Atchison, T. & S. F. Ry. Co. v. Wagner, 102 Kans. 817, 172 Pac. 519.

It is submitted that the cases cited above clearly demonstrate that a carrier is prohibited from collecting demurrage under any other tariff than that filed with the Interstate Commerce Commission, and that *this rule cannot be altered by any device whatsoever.* It must follow, therefore, that the railroad in attempting to collect a demurrage charge *predicated upon certain rules of the Lambert's Point Coal Exchange, an organization maintained and controlled by it, and at variance with the lawful tariffs filed with the Interstate Commerce Commission* is violating the principles as announced in these decisions, and that its suit must therefore fail as not stating a lawful cause of action against this plaintiff-in-error.

The long and short of this aspect of the case is that under a tariff, providing a charge for a car detention only, the railroad is seeking to impose a charge having no relation to detention of equipment but based solely upon the length of time the plaintiff-in-error had credit for coal in the exchange whether or not coal was physically there.

The suggestion that the members could not have coal in the exchange without cars is of no force in a case such as the present where in the sense in which the expression "having coal" is used the members of the exchange "have coal" from the time it is started rolling to the exchange and while the cars containing the same are in transit. We cannot have coal in the

exchange without having cars, but we can have any quantity of coal credits in the exchange without having any *car detention.*

The purpose of the organization of the exchange was "To facilitate dumping, thereby . . . augmenting car supply at the mines."

The briefest examination of the facts shows that the railroad having received the advantage of having its equipment quickly released so that the cars could make more trips between the mines and tidewater, thereby bringing in increased revenue, seeks by this action to collect from the plaintiff-in-error demurrage which never accrued, thereby endeavoring to make its equipment earn for the railroad not only the increased revenue of operation but also and at the same time demurrage for detention that did not exist in fact. The cars could not be standing still and in motion both at the same time.

We are perfectly willing to pay for any car detention for which we may be liable, but having provided the railroad with the "penny" with which to buy its "cake," in the form of operating revenue, we are not willing to present it with another "penny" in the form of demurrage, so that the railroad may have both its "Revenue Cake" and its "Demurrage Penny" at one and the same time.

The charge here sought to be enforced is based necessarily upon the rules and regulations of Lambert's Point Coal Exchange and not upon the filed tariff and as such it is illegal and unenforceable. It is not a claim arising out of the breach of any legally enforceable obligation alleged in the statement of claim.

II. The claim of defendant-in-error is illegal and unenforceable because it is for other and different compensation for service than that provided by the filed tariff, as forbidden by Section 6 of the Interstate Commerce Act.

Section 6 of the Interstate Commerce Act forbids a common carrier to charge, enforce or collect any greater, less or different compensation for service in connection with the interstate transportation of property than that specified in its tariffs filed and in effect at the time.

As has been seen in the argument of the first point the charge which the railroad here seeks to enforce is a charge for the length of time that the plaintiff-in-error had credit in the coal exchange. It also appears that this is not a charge dependent in any way upon detention of cars although conceivably there might be incidentally but not necessarily some car detention.

It further appears from the statement and an examination of the tariff itself that the tariff provides for a charge only in the event of actual detention of cars beyond the allowed free time.

It is therefore obvious that the compensation which the carrier here seeks to collect is entirely different from that specified in the tariff and can be based only on the Lambert's Point exchange agreement.

The United States Supreme Court has several times taken occasion to review special agreements which have been interposed as legal substitutes for the rules and regulations published under filed tariffs and in every case has held that any variance whatever and however accomplished, is contrary to the public policy set up by Section 6, and that all such agreements are illegal and void.

In Southern Railway Company v. Prescott, 240 U. S. 632, the Court at page 638 said:

> "It is also clear that, with respect to the service governed by the Federal Statute, the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates (Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011,

26 Sup. Ct. Rep. 628; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 652, 57 L. ed. 683, 688, 33 Sup. Ct. Rep. 391; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 112, 58 L. ed. 868, 876, L. R. A. 1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593; Louisville & N. R. Co. v. Maxwell, 237 U. S. 94, 59 L. ed. 853, L. R. A. 1915E, 665, P. U. R. 1915C, 300, 35 Sup. Ct. Rep. 494), and the established principle applies equally to any stipulation attempting to alter the provisions as fixed by the published rules relating to any of the services within the purview of the act. . . . No carrier may extend 'any privileges or facilities' save as these have been duly specified. And as the terminal services incident to an interstate shipment are within the Federal Act, and the conditions of liability while the goods are retained after notice of arrival are stipulated in the bill of lading under the filed regulations, the conditions thus fixed are controlling, and the parties cannot substitute therefor a special agreement."

In Dayton Coal and Iron Company, Ltd. v. C. N. O. & T. P. Ry. Co., 239 U. S. 446, the Court at page 451 said:

"That it is essential to the maintenance of uniform rates and the avoidance of rebates and preferential treatment that the tariff rates filed with Commission according to the Interstate Commerce Act, while in force, shall be the only rates which the carrier may lawfully receive or the shipper properly pay, is too thoroughly settled by the former decisions of this court to require further discussion. The principle is stated and many previous cases in this court cited in a case decided at the last term—Louisville & N. R. Co. v. Maxwell, 237 U. S. 94, 97, 98, 59 L. ed. 853, 855, L. R. A. 1915E, 665, P. U. R. 1915C, 300, 35 Sup. Ct. Rep. 494."

In L. & N. R. R. Co. v. Maxwell, 237 U. S. 94, the Court said:

> "Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted under any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it imbodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."

In Chicago and Alton Railroad v. Kirby, 225 U. S. 155, the Court at page 165 said:

> "An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be published in the tariffs; and for a breach of such a contract, relief will be denied, because its allowance without such publication is a violation of the act."

From this it is clear that the action of the carrier in seeking to collect this charge is a flat violation of the provisions of Section 6 of the Interstate Commerce Act as amended; is plainly forbidden thereby, and is therefore illegal and unenforceable.

The railroad sues to recover a sum expressly calculated upon the length of time intervening between the arrival at the exchange of cars shipped by the plaintiff-in-error and the date when the plaintiff-in-error, under the pooling agreement, dumped equivalent tonnage. Car detention may or may not have incidentally existed; the probabilities each way are equal. In any event none is alleged.

To justify and give legal sanction to this charge,

the railroad set forth a filed tariff covering demurrage charges.

This tariff provides a charge for actual car detention *and for that only*. The statement of claim is utterly barren of allegation, or even suggestion that there was any car detention. The method of computing the charge is set forth in the statement; is entirely independent of car detention, and does not even pretend to be in any way based thereon.

The most that the railroad can say in argument, and this is not alleged in the statement, is that there conceivably *may* have been some car detention. With equal probability there may have been *none*.

As the only legal tariff is for car detention, and *for car detention only*, the statement can only be sustained if it clearly and unequivocally alleges car detention, *and car detention only* as the basis of the claim it sets forth.

But the statement here filed is wholly devoid of any such allegation, and being so, is clearly unsustainable.

Under these circumstances it is submitted that this action cannot be maintained but should be dismissed.

III. The statement of claim is insufficient because it seeks to enforce against this defendant a claim which if existent at all can only be enforceable against the Lambert's Point Coal Exchange.

By the articles of organization and its rules the Lambert's Point Coal Exchange became and was a voluntary organization of shippers.

Article 23 provided shipping instructions and railroad waybills (revenue and memorandum):

> "shall show as to consignees the name of the member for whose account shipped, followed by the words 'Care Lamberts Point Coal Exchange, Pool ——.'"

By Article 16, each member was required to sign a blanket order reading as follows:

> "Until further notice the Norfolk & Western Railway is hereby authorized to accept from the manager of the Lambert's Point Coal Exchange, his orders for delivery of any coal consigned for account of the undersigned, in care of the Lambert's Point Coal Exchange."

By Article 14, it is provided all orders for delivery of coal to vessels must be placed with the manager of the exchange.

By Article 26, it is provided,

> "No reconsignment to or from the Exchange will be made unless authorized by the Manager."

By Article 2, among the objects of the exchange, it is provided that the purpose of organization is to have the exchange

> "Act as an Agency for the Pooling of coal and to execute to the Norfolk & Western Railway Company, orders of the members for delivery of tonnage to vessels; permitting the use by a shipper of coal of the same pool to which the member has made shipments, and to the extent of such contributions without being required to apply on the delivery order of a member, the identical coal consigned to him."

Under these provisions, was not the Lambert's Point Coal Exchange in fact the consignee of the coal? Certainly under these rules all the usual powers resting in a consignee with respect to the coal were transferred to the exchange. The rules and regulations are most careful to avoid naming any consignee. They provide, it is true, that the member for whose account coal is shipped shall be "shown" in the waybill as *consignee* but immediately strip him of all consignee's

rights, first, by requiring him in advance to sign over all those rights to the exchange; second, by making the manager of the exchange his sole agent to give orders respecting that coal, and third, by forbidding him to reconsign any coal shipped to the exchange.

The effect of this is to make the exchange the consignee in fact. All the members having coal in any one pool are in the same position as the several owners of grain in an elevator; no one has any particular coal that he can call his own, he has merely a right to have a certain quantity of coal delivered to him out of the common mass. He has no control over what particular cars of coal shall be delivered to him out of the mass.

In the oral argument counsel for the railroad used the illustration of a bank. The depositor puts his dollar in the bank; he is not entitled to have that particular dollar returned to him but he is entitled to a dollar out of the common mass of the bank's assets. Carrying the illustration further, the title to his dollar has passed to the bank and he is merely a creditor of the bank to the extent of his deposit.

So, too, with the members of the exchange. All their rights with respect to their particular coal passed from them when it was consigned to the pool. Each member was no longer the owner of any particular coal; he was a creditor of the exchange entitled to have a certain quantity of coal delivered upon his order.

How, then, can the member be charged with demurrage?

Demurrage is a transportation charge that may be assessed by a common carrier to cover an unreasonable detention of the carrier's equipment by a shipper. Before the shipper can be guilty of any detention, the equipment must have been delivered to the shipper for unloading, or legal tender of delivery must have been made by the carrier. 10 Corp. Juris 467, Section 738;

Grand Rapids & I. R. Co. v. Diettner, 10 Ind. A. 206; N. Y., N. H. & H. Co. v. Porter, 220 Mass. 547.

The statement of claim is defective and insufficient because of its failure to allege that the cars upon which demurrage charges against the plaintiff-in-error are claimed were delivered to it, and that the detention upon which the alleged demurrage charges are based, accrued while the railroad's equipment was in the plaintiff-in-error's possession pending unloading. This allegation, although it is essential to a cause of action for demurrage, is not made and cannot truthfully be made because delivery of the coal was never legally made until the coal was unloaded into vessels, and this unloading immediately discharged the railroad's equipment. Consequently, no detention caused by the plaintiff-in-error could possibly arise. The fact that delivery was never made until the coal was dumped into its vessels appears upon the face of the statement of claim. What prior delivery there might have been was made to the exchange.

This plaintiff-in-error was a member of the Lambert's Point Coal Exchange; the articles of organization and the rules of which are attached as Exhibit "B" to the statement of claim.

In paragraph 4 of the statement, it is alleged that the coal upon which this demurrage is claimed moved pursuant to the exchange arrangement which permitted the railroad to dump one shipper's coal in place of that of another, thus relieving the railroad of the necessity of delivering to each shipper the identical coal originally shipped by him from the mine.

When a common carrier receives freight for transportation it must deliver the identical freight to the consignee named in the bill of lading and failure to do so renders the carrier liable to action in tort for conversion. A pooling arrangement could not be operated, therefore, unless some scheme be set up pursuant

to which the railroad is relieved of this legal necessity of making delivery of the identical coal to the bill of lading consignee.

The pooling arrangement is accordingly attempted to be accomplished by the operation of Exchange Rule 16, which provides that each shipper, shipping through the exchange, shall execute to the railroad a blanket reconsignment order, under which the railroad is authorized to accept from the manager of the exchange his orders for the delivery of any coal consigned to the exchange for the account of the shipper; and by Exchange Rule 14, providing that all orders for the delivery of coal to vessels must be placed with the manager of the exchange. Paragraph 5 alleges that the plaintiff-in-error had executed such a blanket reconsignment order. The exchange was a voluntary association organized as a legal entity and as such was capable of taking delivery.

Under Exchange Rule 23 the coal was required to be waybilled to the particular shipper-member "in care of Lambert's Point Coal Exchange Pool . . ." Pursuant to this billing and the blanket reconsignment the coal, when it arrived at the pier yards, was delivered by the railroad to the exchange. There is nothing in the exchange arrangement as set forth in Exhibit "B," or otherwise alleged in the statement of claim, by which the shipper agrees that such delivery to the exchange will be taken in lieu of delivery to the shipper or legal tender of such delivery.

When the exchange had thus obtained the possession of the coal it incidentally acquired legal title thereto under the reconsignment order which the shipper had executed in blanket form pursuant to Rule 16. Having acquired both possession and legal title, the exchange could then deal with the coal as if it were its own, and could substitute one shipper's coal for that of another indiscriminately. It was this capacity

on the part of the exchange that made the same a desirable agency from the railroad's standpoint, because in so dealing with the coal the manager of the exchange, who was a railroad employee, would designate cars of coal most conveniently placed in the pier yards, thus avoiding the switching operations which would otherwise be necessary to dump the identical coal of each shipper.

The order from the exchange directing the railroad to dump a given quantity and grade of coal into the vessel of a particular shipper, the equivalent of which amount and grade of coal had previously been shipped from the mines for the shipper was, as far as the railroad was concerned, nothing more or less than a reconsignment of other coal from the exchange to the original shipper.

To carry out this arrangement it was necessary that the exchange have not merely the possession of the coal as a bailee, but the legal title thereto. The exchange could only acquire the legal title as a consignee by reconsignment. The blanket order provided for by Exchange Rule 16 supplied the necessary reconsignment order.

To further protect the title and possession which the exchange thus acquired, it was provided by Exchange Rule 6 that the exchange would neither record nor take cognizance of sales of tonnage between members, and as to the disposition of coal, when in a pool, would only execute orders of a member calling for delivery to a vessel, or for reconsignment to a consuming consignee or retail dealer.

The defendant shipper never had possession of the coal involved from the time it left the mines until it was dumped into vessels. Possession during the line haul from the mines to the pier yards was of course in the railroad. When the coal arrived at the pier yards, possession in the railroad was transferred

to possession in the exchange. The shipper, having signed the blanket reconsignment order "Form B" was divested of the legal title to the coal when the same was delivered to the care of the exchange. Having both possession and legal title by reconsignment, the exchange dealt with all coal shipped in its care as the common consignee, revesting title in its respective members by issuing orders to the railroad to dump equivalent coal into their vessels. The orders from the exchange to the railroad can in law be nothing other than orders of reconsignment.

The detention, which is here made the basis for demurrage charges, necessarily accrued while the coal was in possession of the exchange, during which time it also had the legal title to it. As soon as the exchange divested itself of such title and possession by the dumping orders issued to the railroad, the railroad equipment was necessarily released and no further detention could accrue against the shipper-member.

The rule, upon which it is alleged the demurrage charges accrued, was administered pursuant to the exchange arrangement as so described and set forth in the statement of claim. The attempt, therefore, by this suit to hold the defendant directly liable for demurrage charges based upon detention which accrued while both the possession and legal title to the coal were in the exchange is nothing short of preposterous.

If any right exists in the railroad to sue the defendant directly for those demurrage charges, it is only because of some contractual obligation to that effect arising from the exchange arrangement as distinguished from any obligation to the railroad as a common carrier owed by a shipper in interstate commerce. Such arrangement would be unenforceable as we have seen above under Point II.

It may be contended that the legal title to the coal was not in the exchange by virtue of Exchange

Rule 16, but that the exchange was made the members' agent, by the blanket order, to transfer or make deliveries to other members or to third persons. If this was so, then when delivery was made, demurrage stopped against the original consignee under Rule 3, Section 3, of the lawful filed tariff (Exhibit A). Transfer by virtue of a written blanket order surely complies with the tariff provisions. Therefore the railway could not assess demurrage on cars after this transfer had taken place. Yet in the statement of claim the railroad seeks to recover demurrage on the basis of pool accounts irrespective of the date of the actual transfer of the consigned car to a third person.

It is submitted that this is a direct violation of the filed tariff.

Under these circumstances it is obvious that in this case the carrier for the collection of its demurrage should look to the exchange; the demurrage should be assessed against the exchange as a unit.

If this were done, the result would be that the carrier would collect from the exchange every cent that was due it for actual car detention, and neither the exchange nor any of its members would be called upon to pay anything more than the tariff provided.

They would not be called upon to pay on the basis of the length of time they had credit for coal in the exchange but the exchange being assessed for the actual demurrage, the members could contribute to the payment thereof in accordance with their several liabilities.

The only authority which can be found for the railroad under these circumstances here set forth to proceed directly against the members of the exchange is that provided in Articles 17 and 31 of the rules of the exchange but these in turn constitute no part of any filed tariff and are therefore unenforceable.

Again we find the railroad seeking to have its "cake and penny" at the same time. It wishes the advantage of pool operation to make its car supply more active but wishes to hold the individual members, making up the pool, without being forced to look to pool liability or to confine itself to actual detention of equipment as the basis of its demurrage charges.

We submit that in this case if any demurrage was properly due, the exchange alone was liable to the railroad and the railroad is not entitled to enforce the same against any of the component members individually.

Conclusion.

In conclusion we respectfully submit that the decision of the Circuit Court of Appeals of the Third Circuit affirming the judgment entered in the District Court was erroneous and should be reversed.

Respectfully submitted,

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Counsel.

Office Supreme Court,
FILED
FEB 7 1927
WM. R. STANSB
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In the

Supreme Court of the United States

No. 25

October Term, 1926

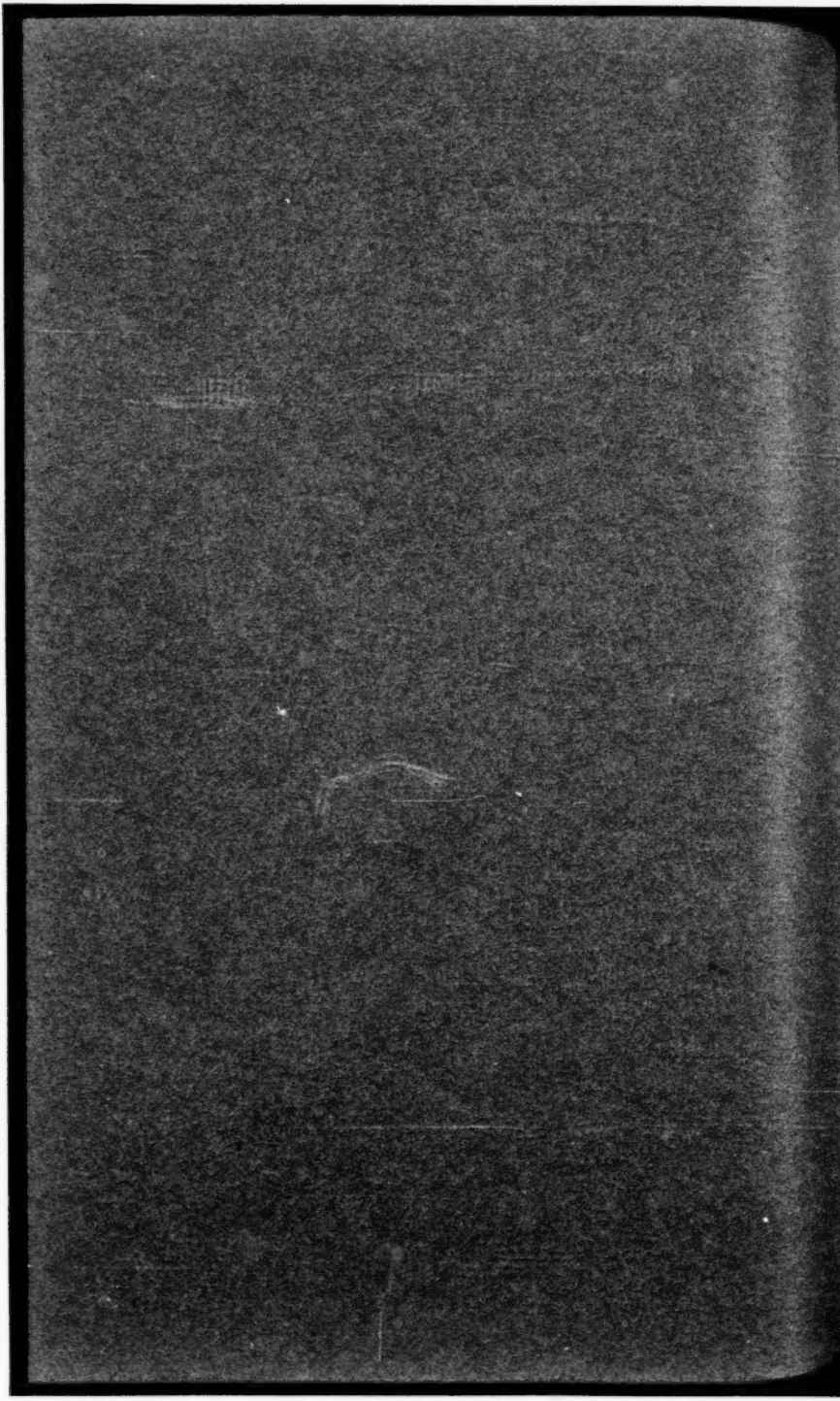
[redacted] COAL MINING COMPANY AND [redacted] FIDELITY AND CASUALTY COMPANY OF NEW YORK, *Petitioners*,

v.

NORFOLK AND WESTERN RAILWAY COMPANY, *Defendant in Error*.

In Error to the United States Circuit Court of Appeals for the Fourth Circuit.

PETITIONERS' [redacted] AND BRIEF



SUPREME COURT OF THE UNITED STATES.

No. 70.—October Term, 1926.

Emmons Coal Mining Company and The Fidelity & Casualty Company of New York, Plaintiffs in Error, *vs.* Norfolk & Western Railway Company.	In Error to the United States Circuit Court of Appeals for the Third Circuit.

[January 3, 1927.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit by the Norfolk and Western Railway Company to recover demurrage on cars at Lambert's Point, Virginia, from the Emmons Coal Mining Company and its surety. An affidavit of defence upon matters of law was filed, but was held insufficient by the District Court, 287 Fed. Rep. 168, and judgment subsequently was entered for the plaintiff. The judgment was affirmed by the Circuit Court of Appeals. 3 F. (2nd) 525.

To facilitate the delivery of coal at tidewater some of the owners of mines upon the lines of the Railway made an arrangement with the latter by which the cars were sorted at Lambert's Point upon different tracks according to the quality of the coal, and delivery was made to their respective customers from the cars most convenient at the moment, irrespective of ownership, if the seller had that amount of coal on hand in cars within the space limits agreed. To work this out the parties formed an association, called the Lamberts Point Coal Exchange, with a manager who kept books in which he credited to each owner coal destined to the Point as soon as it passed Bluefield, West Virginia, noting its quality, and ordered delivery within the amount so credited, as required, to the owner's customers. If the delivery were required to be from the consignor's own cars, as it would be in the absence of agreement, of course if the cars were detained beyond the allowed time demurrage would be payable. When under the arrangement one member's cars were emptied to fill the order of another member, other cars with similar coal would have to be kept, in order to

satisfy the first member's right when it came to assert it, and it should pay as in the first case, since the delay would be the same to the railroad whichever of its cars were detained. The responsibility of the owner for them is the natural corollary of the benefit that each owner gets by having its order filled from the nearest cars.

In the present case the demurrage demanded is fixed by the foregoing rule. The plaintiffs in error say that by the tariff that governs the matter they can be charged only for the cars actually used and detained by them; that to make the tariff cover a substitution it must be modified by the rules of the Exchange, which cannot be done, and that if there is a claim against anyone, it is a claim against the Lamberts Point Coal Exchange.

The last point may be dispatched in a few words. The articles of organization of the Exchange provide that the member shall be responsible to the Railway for demurrage, and that the shipping instructions, &c., 'shall show as the consignee the name of the member for whose account shipped, followed by the words "care Lamberts Point Coal Exchange Pool—."' The Coal Company's consignments were in accordance with the agreement, and by the agreement or without it made the Company the consignee. We come therefore to the tariff the construction of which is the only point much argued in the case.

The important clauses are in Rule 3, and Rule 4.

"(b) A car shall be considered as released:

"1. At the time vessel registers for the cargo or fuel supply of which the coal, coal briquets or coke dumped into such vessel is a part, except that when cars are unloaded before the vessel registers such cars shall be released when unloaded.

"2. To avoid delay that would be entailed in switching out and delivering on shipper's order, in actual sequence of arrival, cars containing the same grade of coal, as indicated by the identifying consigning names or numbers on the waybills, the dates on which cars should have been so released (as indicated by the record) will be substituted for the dates on which equivalent tonnage was actually delivered and the detention will be computed on the basis of such substituted dates.

"3. The dates shipments are transferred by written order and acceptance to another party shall be considered the date of release of the car for the account of the original consignee and subsequent detention shall be charged in the account of the new consignee without any free time allowance."

• • • • • • • • •

"Rule 4.—Demurrage Charges

"Settlement shall be made on the basis of detention to all cars released during the month. The date of arrival notice shall be subtracted from the date of release. From the total days detention to all cars thus obtained, deduct all Sundays and legal holidays following the date of arrival and five (5) days free time allowance for each car, except on cars containing coke for export deduct ten (10) days free time allowance for each car: the remainder, if any, will be the number of days to be charged at the rate of $2.00 per car per day. Excess credit days of any one month cannot be deducted from the excess debit days of another month."

These clauses were construed by the Interstate Commerce Commission in an able opinion as authorizing the 'substitution of any car containing a similar grade of coal for the one ordered dumped,' when the parties have so agreed, and as warranting the charges questioned here. They also were held reasonable as so construed. *Smokeless Fuel Co.* v. *Norfolk & Western Ry. Co.*, 85 I. C. C. 395. The matter is one upon which the opinion of the Commission would carry great weight, even if we thought its conclusion less obvious than we do. See also *Smokeless Fuel Co.* v. *Chesapeake & Ohio Ry. Co.*, 142 Va. 355. The fairness and reasonableness of it ought to prevail against meticulous arguments drawn from the fact that the rules are made with unassociated shippers most prominently in mind, or from rarely realized possibilities of demurrage being charged where coal is delivered on the credit of cars actually in transit from Bluefield, although those cars are not delayed. In the ordinary course of things cars will be kept on hand to answer the mine owner's credit, and it is for its as well as for the Railway's advantage that they need not be the very cars that the mine owner has used.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court. U. S.

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IN THE

Supreme Court of the United States

No. 70.

OCTOBER TERM, 1926.

EMMONS COAL MINING COMPANY AND THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, *Plaintiffs in Error,*

v.

NORFOLK AND WESTERN RAILWAY COMPANY, *Defendant in Error.*

In Error to the United States Circuit Court of Appeals for the Third Circuit.

PETITION FOR REHEARING, PRAYING THAT NO. 70 BE SET DOWN FOR REARGUMENT WITH NO. 299, OCTOBER TERM, 1926, WHEN REACHED.

I.

Demurrage Caused by Aftermath World War Conditions, Beyond Shippers' Control. Tariff Void. Contains no Excuse Whatever From Compliance with Rigid Requirements.

The petition of Emmons Coal Mining Company and The Fidelity and Casualty Company of New

York, plaintiffs in error, in No. 70, October Term, 1926, prays for a rehearing, and that said case be set down for reargument together with Pan Handle Coal Company, Case No. 299, October Term, 1926, when same is reached, and respectfully shows unto the Court:

That on January 3, 1927, this Court affirmed the judgment below in the case of Emmons Coal Mining Co. *et al.*, plaintiffs in error, v. Norfolk and Western Railway Co., No. 70, October Term, 1926.

That petitioners will present matters of law not brought to the attention of this Court nor the lower courts.

If the decision of this Court in the Emmons case is to be universally applied, it will mean ruin and bankruptcy to shippers in the Pan Handle case and a group of cases stipulated to follow the judgment therein, involving approximately $318,642.34 demurrage charges.

The decision of this Court in this Emmons case may also seriously affect the Smokeless Fuel group of cases involving demurrage to an amount exceeding $400,000.00, with consequent ruin and bankruptcy.

This group of cases is now before the Supreme Court of Appeals of Virginia on Writ of Error for the second time, and will soon be argued.

The United States Supreme Court, in the Emmons decision, cites *Smokeless Fuel Co.* v. *Chesapeake & Ohio Ry. Co.*, 142 Va. 355, but its attention was not called to the fact that the Smokeless Fuel case is again before the Court of Appeals of Virginia.

Many of the questions, as well as the tariff, are

different in the Smokeless case from those in the Pan Handle and Emmons cases, but the fact that this Court, in its opinion in the Emmons case, cites as authority the former decision of the Virginia Court of Appeals in the Smokeless Fuel case may involve some danger.

There are other cases pending in various courts, involving large amounts, which will be seriously affected if the Emmons decision of this Court is to be universally applied.

It is extremely unusual for demurrage charges to run into the hundreds of thousands of dollars.

The natural inquiry is: What caused this most extraordinary situation?

The answer is: A great public calamity and aftermath of the World War, wholly beyond the control of these shippers or anyone else.

It will be noted by reference to pages 27 to 85, inclusive, of the record in the Emmons case, that these demurrage charges accrued from September, 1920, to and including March, 1921. That is to say, in the latter part of the year 1920 and in the early part of the year 1921.

This was during the period of deflation, financial panic throughout the world, business cataclysm and paralysis of our export trade. It came suddenly and unexpectedly.

The situation was so serious that, on the recommendation of the Secretary of the Treasury, the Congress revived the activities of the War Finance Corporation by Joint Resolution January 4, 1921, over the veto of the President, and later passed the Act of August 4, 1921, with authority to the War Finance Corporation to assist the financing of ex-

port trade to the extent of not exceeding one billion dollars at any one time (Fed. Stat. Ann. (2d), Supp. 1921, pp 26-29).

The Act discloses that the Congress considered the conditions growing out of the World War, and the disruption of foreign trade, to be still continuing.

During the early part of 1920, trade was booming, and millions of tons of coal were exported and paid for by credits established in New York by European governments and individuals.

Coal exporters had made contracts with the mines to ship coal by trainloads to the ports, to fulfill contracts of sale abroad. Pooling arrangements were made to classify coal and to avoid delay to vessels of railroad cars at the ports. There was little or no demurrage during these times and everything was going smoothly.

In the case of *Tidewater Coal Exchange* v. *B. & O. R. R. Co.*, 96 I. C. C. 612, the Commission, at page 615, says that there was no demurrage "to any appreciable extent during 1920."

The Commission said that during that period there was an urgent demand for coal, and that not until January, 1921, did demurrage accrue to any great extent.

In the latter part of 1920, suddenly and without warning, there was business collapse, paralysis of export trade, crash of the stock market and financial panic.

We print as Appendix "A" hereto, a chart or curve, appearing in "The Annalist," August 13, 1926, a New York Times Company weekly publication. This chart, or curve, deals with a period of 42 years, from 1884 to 1926. It shows that the de-

pression of 1920-1921 was the most precipitate and most severe, as contrasted with any period for 42 years between 1884 and 1926. It was more severe than 1914, when the World War broke out.

The immediate cause of the business collapse was the discontinuance of credits by the United States to foreign governments, and the exhaustion of the ten billion dollar loan which had been made by this country.

The termination of these credits and the exhaustion of the ten billion dollar loan left Europe without funds, and parties and concerns buying coal for use in Europe suddenly began to cancel contracts in the latter part of 1920; so that the exporters of coal who had made arrangements with the mines found the coal rolling to the ports in huge volume, and were utterly unable to stop it instantaneously, or to dispose of the coal when it reached the port—through no fault of their own, but purely as a result of after-war conditions, a process of deflation and general readjustment throughout the world, accompanied by inevitable trade convulsions.

In 1921 the exports of coal from this country precipitately fell off approximately fifteen million (15,000,000) tons, as contrasted with 1920—according to official reports of the United States Department of Commerce (see p. 508, Statistical Abstract of U. S. 1924, Bureau of Foreign and Domestic Commerce, U. S. Dept. of Commerce).

The Department of Commerce Official Reports show that exports to Europe from this country fell off during 1921 more than three billion ($3,176,576,001.00) dollars, as contrasted with 1920, (see Ninth Annual Report of Secretary of Commerce, p. 50).

The Thirty-fifth Annual Report of the Interstate Commerce Commission for 1921, at page 47, shows that on April 8, 1921, there were 507,274 idle cars on the sidetracks and storage rails of the carriers of the United States—the greatest number ever known in their history. There were literally miles and miles of idle cars standing on the sidings of the railways in this country.

It was a matter of common knowledge and everybody saw them.

There were more than twice as many idle cars as there were in 1914, the year of the outbreak of the World War. In 1914 the greatest number of idle cars was 240,000, in June (see Information Bulletin No. 13, Jan. 22, 1922, page 1, Comparison of Abnormal Surpluses, issued American Railway Association, Car Service Division).

The same Bulletin shows the greatest number of idle cars in 1915, was about 305,000 in April.

The dumping and release of these coal cars in the Emmons case would simply have increased the number of idle cars, already the hugest on record.

Nobody who could use a car was deprived of a car.

The chief object of demurrage rules is to penalize shippers for holding cars after free time, so as to enable other shippers to get cars when they need them, and to enable railways to use their cars.

> "The purpose of demurrage charges is to promote car efficiency by penalizing undue detention of cars."
> *P. R. R. Co.* v. *Kittaning I. & S. Mfg. Co.*, 253 U. S. 319, 353; 64 L. ed. 928, 930.

Dumping and releasing these cars in the Emmons case would have helped no one. Certainly failure to dump and release them harmed no one. Indeed, it might have been a benefit to the railways to let them remain where they were, rather than be put to the trouble and expense of hauling the empties away and parking them on already overcrowded storage tracks.

Similar considerations were expressly mentioned by this Court in a case which we will cite later.

Under a clause in the published Uniform Bill of Lading, the railway has a right to unload the cargo and store it at the expense of the shipper, and restore the car to service. The railway did not avail itself of this right.

In the Smokeless case now pending in the Virginia Courts, it is stated in the record that defendants, Smokeless Fuel Co., were ready to prove that the Chesapeake & Ohio Railway Company, through its Vice President in charge of traffic, took the statesmanlike view that both shipper and carrier, without fault of either, had been overtaken by a common catastrophe; that the shipper was powerless to unload, and the railway powerless to obtain loads for empty cars, and that this company would be glad to remit this demurrage if any legal way could be found to do so.

But, owing to the danger of prosecution for departures from the tariff, and the Commission's rule that all efforts to collect tariff charges must be exhausted by the railways, the Chesapeake & Ohio Railway felt obliged to sue for collection.

The railroads themselves did not omit to ask the Congress for aid on account of war conditions in

1920, and did not fail to ask the Congress to recognize the existence of war conditions in 1920.

In response to the request of the railroads, the Congress did recognize the existence of war conditions in 1920, and by the Transportation Act, 1920, (41 Stat. at L. 456) provided a guaranty period of 6 months from March 1, 1920, for the benefit and assistance of the railroads.

The railroads availed themselves of these benefits, and received many millions of dollars to help them tide over the difficult readjustment period which was an aftermath of the World War.

But, in issuing their demurrage tariffs covering this period, no aid, assistance or excuse was given to shippers by the railroads, notwithstanding the shippers were victims of the great business public calamity which followed the war.

The sole question here is the construction of N. & W. Tariff I. C. C. 2828-B (printed at pp. 15 and 16, Record, Emmons case, and also as Appendix "B" hereto).

The construction of a tariff is a question of law for the Court.

Great Northern R. Co. v. *Merchants Elevator Co.*, 259 U. S. 285, 66 L. ed. 943.

Turner, etc., Lumber Co. v. *C. M. & St. P. Ry. Co.*, 271 U. S. 259.

Construction includes matters making the instrument void; also matters involving the meaning of the phraseology employed.

Norfolk & Western tariff I. C. C. 2828-B is void on its face, and these demurrage charges are invalid and cannot be collected.

This tariff requires shippers to unload within a peremptory, absolute time, without containing any excuse or exemption whatever from penalties on account of circumstances beyond the shippers' control preventing his unloading.

This Court in numerous cases has settled clearly and definitely that where a statute or demurrage rule prescribes a rigid, inexorable and absolute time for furnishing or unloading a car, and contains no excuse whatever, providing that a party shall be exonerated on account of circumstances beyond his control, it is void on its face and penalizes a party for failure to do the impossible.

The leading case is that of *Houston & Texas R. Co.* v. *Mayes*, 201 U. S. 321, 50 L. ed. 772.

In that case, the facts were that the State of Texas had passed a statute requiring railroads to furnish cars upon demand, not to exceed six days from the receipt of the shipper's application. Upon failure of the railroad to comply within the time, it was made liable to the shipper in the sum of $25 per day for each car it failed to furnish. It was also provided that the railroad should pay the shipper all damages incurred.

The Act provided that the law "shall not apply in cases of strikes or other public calamity." These were the only conditions which would excuse the railroad from furnishing cars under circumstances which it could not control, such as "an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities," etc. (201 U. S. 321, 331, 50 L. ed. 772, 776).

It is interesting to note that the Supreme Court

of the United States held this Act to be unreasonable and void, because *inter alia* it failed to provide that the railroads would be exempt from damages or penalties in the case of "an unexpected turn in the market."

It would seem that, if an Act of the Legislature of the sovereign State of Texas is unreasonable and void because it fails to provide exemptions in the case of "an unexpected turn in the market," that a demurrage rule in the tariff of a common carrier must likewise be unreasonable and void for failure to incorporate a provision exempting the shipper from payment of demurrage charges in the case of a great business cataclysm, caused as an aftermath of a World War. The United States Supreme Court considered an ordinary depression or "unexpected turn in the market" a sufficient omission to declare void for unreasonableness the Texas statute.

We have already called this Court's attention to the fact that the Texas statute contained a provision that the law "shall not apply in cases of strikes or other public calamity," and, notwithstanding this, the Supreme Court of the United States held the Act unreasonable and void because it did not also contain additional provisions for exemption.

N. & W. tariff I. C. C. 2828-B contains no excuse whatever, not even "strikes and public calamity."

We call the Court's attention to the following language used in the opinion of the Supreme Court of the United States in the *Mayes Case:*

> "While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight

and passengers, and to regulate the general subject of speed, length, and frequency of stops, for the heating, lighting and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock, we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the state, and amounts to a burden upon interstate commerce. It makes no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other states or in other places within the same state. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts, or other unavoidable consequences of heavy weather.

"A dereliction of the road in this particular, which may have occurred from circumstances wholly beyond the control of its officers, is made punishable not only by damages actually incurred by the shipper in the detention of his stock, but, in addition thereto, by an arbitrary penalty of $25 per car for each day of detention. The penalty which was assessed in this case, though the detention was only for one day, amounted to nearly as much as the damages, and might, in another case, amount to far more."

Houston & Texas C. R. Co. v. *Mayes*, 201 U. S. 321, 50 L. ed. 772, 775-776.

Again, in the same case, the Supreme Court says:

"It should be borne in mind that the act does not apply to cattle alone, but to all cases 'when

the owner, manager, or shipper *of any freight of any kind* shall make application in writing,' etc. The duty of the railroad company to furnish the cars within the time limited is peremptory and admits of no excuses, except such as arise from strikes and other public calamities. If, for instance, the owner of a large quantity of cotton should make a requisition under the act for a number of cars, the railway company would be bound to furnish them upon the day named, or incur a penalty of $25 for each car, though the detention of the cotton involved no expense to the owner, or may even have resulted in a benefit to him through a rise in the market.

"While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where, by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfill all its legal requirements cannot provide for, and against which the statute in question makes no allowance."

Houston & Texas R. Co. v. *Mayes*, 201 U. S. 321, 50 L. ed. 772, 776.

It is respectfully submitted upon the above reasoning, so clearly stated by the United States Supreme Court, that a demurrage tariff which compels a shipper to pay a penalty—which accrued during a period of world-wide business depression, caused by a process of deflation inaugurated by the government of the United States under circumstances wholly beyond the control of the shipper—is unreasonable and void on its face, because it does

not contain provisions exempting the shipper under such circumstances.

It will be noted that in the *Mayes case* the Supreme Court of the United States condemns as unreasonable and void a statute of the State of Texas because it makes no exception in the case of "an actual inability to furnish cars by reason of their temporary and unavoidable detention."

The tariff now in question is unreasonable and void because it makes no exception for the actual and admitted inability of the shipper to dispose of the coal, growing out of a sudden and unexpected stoppage of foreign credits by the United States government, the enormous, sudden and unexpected cancellation of coal contracts by foreign governments and purchasers, etc., etc.—circumstances wholly beyond the shippers' control.

It will also be noted that the Supreme Court of the United States declares this Texas statute void because it fails to make an exception in the case of "a dereliction of the road * * * which may have occurred from circumstances wholly beyond the control of its officers."

So the tariff in the case at bar is unreasonable and void because it fails to contain an exception excusing the shipper for a dereliction in the detention of cars "which may have occurred from circumstances wholly beyond the control" of the shipper.

It will also be noted that the Supreme Court gives an example, or illustration, as to the shipment of a quantity of cotton for which requisition of cars has been made and which has not been complied with, and the Court points out that the penalties of the Act are unreasonable because "detention of the

cotton involved no expense to the owner or may even have resulted in a benefit to him through a rise in the market."

In other words, failure to furnish the cars would harm no one.

So in the case at bar, the tariff is unreasonable and void because, if the shipper in 1921 had dumped the cars, they would simply have been returned to the sidetracks and added to the number of idle cars already there, and the mere detention of the cars with the coal at Lambert's Point involved no expense to the railway and did no harm to anybody. At that period, there was no use or demand for cars.

No other shipper was deprived of cars. The chief object of demurrage rules is to penalize shippers for holding cars after free time, so as to enable other shippers to get cars when they need them.

> "The purpose of demurrage charges is to promote car efficiency by penalizing undue detention of cars."
> *Penna. R. Co.* v. *Kittaning I. & S. Mfg. Co.*, 253 U. S. 319, 353; 64 L. ed. 928, 930.

It is interesting to note that in the *Kittaning case* the court had before it the construction of what is known as the Uniform Demurrage Code, which applies to all freight in the United States, except freight for transshipment at the ports, which latter is expressly excepted from the Code, and it is therein provided that each individual railroad shall formulate demurrage rules for tidewater freight.

The court cites at length, in a note, certain rules from the Uniform Demurrage Code, and it appears that in this Uniform Demurrage Code there are in-

corporated excuses exempting a shipper from unloading within the time prescribed, on account of weather conditions preventing unloading, and on account of the fault of the carrier, such as bunching cars.

But, in Norfolk & Western tariff I. C. C. 2828-B, involved in the present case, there is no excuse whatever, neither weather conditions, bunching cars nor other fault of the carrier, act of God, strikes, public calamity, nor anything else.

An examination of the record in the *Mayes case,* in the United States Supreme Court, shows that the court took judicial notice of the fact that circumstances might arise which would make it impossible for the party to comply with the demurrage rule of the statute.

This feature is mentioned, and pointed out, by the Supreme Court of Appeals of Virginia, in the case of *Southern Ry. Co.* v. *Commonwealth,* 107 Va. 771, 60 S. E. 70, wherein the Demurrage Rules of the Virginia State Corporation Commission were held to be void because containing no excuse.

The Supreme Court of Appeals of Virginia says that the Texas statute—

> "* * * was held invalid on the declared ground that exceptions were not made for cases which might occur, rendering the carrier unable to furnish cars within the time specified; but a careful examination of the printed record in that case fails to disclose any evidence of a washout or sudden congestion of traffic, or unavoidable detention of cars in other states, or in other places in the same state, or any other circumstances which the court declared should excuse the railroad company from furnishing cars

applied for. In other words, the court took judicial notice of the fact that such conditions might arise, and for that reason the statute was 'likely' to do great injustice to the roads, * * *"

Southern Ry. Co. v. *Commonwealth,* 107 Va. 771, 780, 60 S. E. 70.

We will cite further authorities as to judicial notice later.

The *Mayes case* has been followed and cited with approval many times. See—

McNeill v. *Southern R. Co.,* 202 U. S. 561, 50 L. ed. 1148.

New Mexico ex rel McLean v. *Denver & R. G. R. Co.,* 203 U. S. 50, 51 L. ed. 86.

People ex rel. Stead v. *Chicago, I. & L. R. Co.,* 223 Ill. 592, 79 N. E. 144.

Atlantic Coast Line R. Co. v. *Mazursky,* 216 U. S. 122, 134; 54 L. ed. 411, 417.

Southern R. Co. v. *Reid,* 222 U. S. 425, 441; 56 L. ed. 257, 262.

Savage v. *Jones,* 225 U. S. 501, 525; 56 L. ed. 1182, 1191.

Yazoo & Mississippi Valley R. Co. v. *Greenwood Grocery Co.,* 227 U. S. 1, 57 L. ed. 389, 391.

Hampton v. *St. Louis, I. M. & S. R. Co.,* 227 U. S. 456, 464; 57 L. ed. 596, 598.

Simpson v. *Shepherd,* 230 U. S. 352, 401; 57 L. ed. 1511, 1542.

Chicago, R. I. & Pac. R. Co. v. *Beatty,* 234 U. S. 753; 58 L. ed. 1577.

Michigan C. R. Co. v. *Michigan R. R. Comm.,* 236 U. S. 615, 635; 59 L. ed. 750, 758.

Illinois C. R. Co. v. *Mulberry Hill Coal Co.*, 238 U. S. 275, 279; 59 L. ed. 1306, 1308.
Southern Railway Co. v. *Commonwealth*, 107 Va. 771; 60 S. E. 70.
Southern Railway Co. v. *White*, 284 Fed. R. 560 (C. C. A. 6th Cir.).

In the case of *Yazoo & Mississippi Valley R. Co.* v. *Greenwood Grocery Co.*, 227 U. S. 1, 57 L. ed. 389, above cited, the Supreme Court of the United States declared that a demurrage rule of the Mississippi Railroad Commission was void because it was absolute, and made no allowance whatever for any justifiable and unavoidable cause for failure to deliver cars within the peremptory time required by the rules.

In the case of *Chicago, R. I. & P. R. Co.* v. *Beatty*, 234 U. S. 753, 58 L. ed. 1577, the Supreme Court declared a demurrage statute of the State of Oklahoma void on the authority of the *Mayes case*. The doctrine had become so well settled at the time this case was decided that the Court merely entered a memorandum opinion "upon the authority of *Houston & T. C. R. Co.* v. *Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; *Yazoo & M. Valley R. Co.* v. *Greenwood Grocery Co.*, 227 U. S. 1, 57 L. ed. 389, 33 Sup. Ct. Rep. 213" (58 L. ed. 1577).

In the case of *Southern Railway Co.* v. *White*, 284 Fed. 560 (C. C. A., 6th Circuit), the Circuit Court of Appeals affirmed the judgment of the District Court for the Eastern District of Tennessee, rendered by Judge Sanford, now Mr. Justice Sanford of this Court.

The facts in that case were that a shipper on a logging road ordered cars, and they were sent up to

his plant on the logging road. Shortly after the cars were delivered at the plant, a heavy storm washed away a bridge intervening between the shipper's mill and the junction point with Southern Railway, and the cars could not be returned because the bridge was physically destroyed and there was no way of getting them back within the time prescribed by the demurarge tariff.

The demurrage tariff, as usual, contained no excuse for failure to load the cars and return them within the absolute, peremptory time prescribed. The court held that under such a tariff no demurrage charges could be collected.

So we see that it is clearly settled by repeated decisions of this court, and other courts, that a demurrage statute or tariff is void when it fails to contain any excuse whatever by which the shipper may be exonerated from unloading a car, or a railway company may be exonerated from furnishing a car, under circumstances beyond the control and power of the party, making it impossible for him to comply with the rigid, peremptory, absolute requirements of the tariff.

Such a tariff is void on its face as a matter of law.

A mere inspection of Norfolk & Western demurrage tariff I. C. C. 2828-B, printed as an appendix hereto, shows that it is void on its face, under these decisions, and no demurrage charges can be collected under this tariff.

II.

Members of Pool Tenants in Common in Mass of Fungibles. No Substitution. Each Partitioned and Dumped His Own Coal, Not that of Another Member.

We now come to the phraseology of Norfolk & Western tariff I. C. C. 2828-B.

In this connection, we call attention to another matter of law which has been overlooked by the Commission and the lower courts, and does not seem to have been presented for their consideration.

All these decisions of the Commission and the lower courts discuss pooling coal, but entirely omit and overlook the nature and effect thereof.

The pooling of coal results in making all contributors tenants-in-common in a mass of fungibles, just as a number of people who put grain in an elevator.

This is obvious and well settled. *New River Collieries Co.* v. *Snider,* 284 Fed. 287; *Coyle* v. *McNeil,* 284 Fed. 298.

In the latter case, at page 298, Judge Learned Hand says:

> "I have already, in the New River Collieries case, 284 Fed. 287, stated my reasons for believing that each pool was to be treated as a mass of fungibles owned in common, the shares being determinable by the deposits and withdrawals of the members * * * The earmarking of cars would become irrelevant, since upon their arrival it was the common purpose of all that they should lose their proprietary identity." (284 Fed. 298-299.)

Judge Learned Hand said, in the *New River Collieries* case: After shipping his coal into the pool, the shipper was entitled—

> "* * * to an aliquot share in the whole pool, dependent upon his proportion of the whole" (284 Fed. 287, 290).

In the case of *Norfolk & Western Ry. Co.* v. *Fort Dearborn Coal Co.*, 280 Fed. 264, the Circuit Court of Appeals for the Fourth Circuit, in an opinion by Judge Knapp, held that when coal passes Bluefield, under the arrangement of the Lambert's Point Coal Exchange, the shipper has no right to divert it, as it has already become a part of the pool. It was further held that when it becomes a part of the pool, the coal loses its identity.

It was further held that where a railroad confiscates the coal before it reaches the pier, the measure of damages for the conversion is the credit of the shipper on the books of the Exchange, segregation and partition having been made by the railroad.

In the case of *Tidewater Coal Exchange* v. *B. & O. R. R. Co.*, 96 I. C. C. 612, the Interstate Commerce Commission says:

> "The coal was not pooled in the sense of being dumped into storage bins, but remained in the cars on storage tracks assigned to that particular grade of coal until unloaded into vessels or otherwise disposed of. During the period June, 1920, to November, 1920, the exchange had from 18 to 20 different pools at one Baltimore pier.
>
> "When a car entered a pool it lost its identity, and when the shipper to whose account the car was credited desired coal of the same quality and quantity to be dumped into a vessel, it

> was dumped from cars most convenient in the pool, without respect to its actual ownership." (96 I. C. C. 612, 614.)

The effect of pooling cannot be ignored and overlooked. Yet that very thing has been done before the Commission and throughout these cases in the lower courts.

The word "pool" is used frequently, but the nature and effect of a pool has been entirely ignored—naturally with erroneous and confusing results.

Throughout the opinion of the Commission, and throughout the opinions of the lower courts, there is constant reference made to one shipper substituting the car of another shipper, dumping the coal of another shipper, etc., etc.

This is erroneous and meaningless in connection with a pool, because all shippers in the pool are tenants-in-common of a mass of fungibles and each is entitled *per my et per tout* in the total mass of coal according to the proportion which he has put into the pool.

When he takes that proportion of coal which he has put into the pool out of the pool, he separates and partitions it from the pool, and it is his individual property immediately after the partition and separation. He can give, and does give, good title to the purchaser.

He does not dump another shipper's coal at all; he dumps his own coal. There is no substitution.

All calculations based on the theory that another shipper's coal has been dumped are erroneous. All calculations in these cases are made on that erroneous assumption.

Now, when a pool member dumps from a coal pool 5,000 tons of coal owned by him, the moment it is partitioned from the pool and that coal is dumped from a group of cars, all of the same or of varying capacity, what is to be done about assessing demurrage charges per single car?

The demurrage tariff ought to show this.

Demurrage charges must be published.

> "The right to assess charges for undue detention existed at common law. Now they are subject, like other freight charges, to regulation by the Commission. Demurrage charges are thus published as a part of the tariffs filed pursuant to the statutes."
>
> *Turner, Dennis & Lowry Lumber Co.* v. *C. M. & St. P. Ry. Co.*, Official Reports U. S. S. Ct., Preliminary Print, 271 U. S. 259.
>
> See also Par. 7, Sec. 6, Transportation Act, 1920 (41 Stat. L. 483).

But when we refer to Norfolk & Western Tariff I. C. C. 2828-B (R. 15-16), we find there is not a word about this situation; not a word as to how demurrage charges should be assessed in reference to dumping from a pool; and not a word authorizing performance of the service itself.

The whole thing is entirely *casus omissus*.

The moment the coal went into the pool it lost its identity, under the rules of the Exchange (Rule 2, R. p. 112).

And the coal contained in any and all the cars in the pool was subject to be dumped by any member up to the extent of his credits on the books of the coal exchange (Rule 15, R. p. 115).

No member in a pool could have, or did have, an ear-marked amount of coal, nor an ear-marked car containing same. Otherwise, there would have been no pool.

All orders for dumping had to be made by the Exchange Manager (R. 115-116).

In the case at bar, cars were invariably dumped from the pool, irrespective of "their proprietary identity," to use the phrase of Judge Learned Hand.

Emmons' fallaciously supposed individual cars (which were in reality common tenancy cars), were dumped by some other member from the pool. (R. 27-86, N. & W. Exhibits.)

In the testimony before the Commission in this case, Emmons Co., and all others being parties, entitled *Smokeless Fuel Co. Inc.* v. *N. & W. Ry. Co.*, I. C. C. Docket 13281, Reported 85 I. C. C. 396, the principal witness for Norfolk & Western Railway Company, Mr. Gutheim, at page 222, says:

> "It wasn't coal in a pile; it was coal in cars; and there the identity of the cars as to initials and numbers were lost sight of."

Which is precisely what Judge Learned Hand said (284 F. 298-299.) Throughout the whole period, the cars were operated by the railway as a pool.

So that, in connection with a pool of coal, it is perfectly meaningless to talk about one member taking another member's coal, or another member's car.

The testimony before the Commission is not in the Record, but it may be permissible to refer to it, as this is a case "not in the nature of a private liti-

gation * * * but was a matter of public concern in which the whole body of shippers was interested." *A. J. Phillips Co.* v. *Grand Trunk W. R. Co.*, 236 U. S. 662, 665.

Later, we will make one or two references to the testimony taken before the Commission in this case, but will not pause to explain that we do it upon the idea of public interest, as indicated in the Phillips case.

We realize and admit that this testimony is not in the Record before this Court, and that technically it cannot be referred to.

But the few passages which we will quote hereafter, corroborate and support the record in this case and the demonstrations therefrom, and will be wholly out of the mouths of N. & W. Railway witnesses and we hope will aid this Court.

When a pool member dumps 5,000 tons of coal, it may be dumped from a group of cars of different capacities—40 tons, 50 tons, 100 tons. The demurrage charge is always per car, irrespective of capacity.

In the *Kittaning Case*, 253 U. S. 319, 324, 64 L. ed. 928, 930, this Court called attention to the difference between the car and the cargo, and pointed out that it was the cargo which was frozen, and not the car; and that the unit of demurrage charges was always "the single car."

Nothing was done, and there is nothing in the record to show that anything was done, with reference to changing the demurrage tariffs or the railroad bookkeeping methods, so as to reflect the situation growing out of the creation of the pool.

Hence, we have confusion worse confounded.

Norfolk & Western demurrage tariff I. C. C. 2828-B is a tariff framed for the purpose of applying only to individual shippers, such as the Standard Oil Company, United States Steel Corporation, or any other individual. It is the same individual tariff which was in existence for years, with minor changes from time to time, but with no change to cover the pooling idea.

It is claimed that a change was attempted. But it did not and does not cover the pooling idea.

The demurrage bookkeeping methods of the railroad are framed with respect to individual shippers.

It never occurred to the railroad to change its demurrage tariff or to change its methods of bookkeeping so as to cover the handling of coal in a pool. This vital change in the status of the shipper was not reflected in the tariff, nor in the bookkeeping methods of the railway.

Tariff changes were made by other railroads operating coal pools, and methods of bookkeeping entirely different from those of the Norfolk & Western were used.

The Chesapeake & Ohio Railway, at least temporarily, felt it necessary to frame a tariff expressly dealing with the pool idea, and the operations of the Newport News, Virginia Coal Exchange.

Unquestionably, the requirements of Sec. 6 of the Commerce Act make it obligatory on the Railways to publish a tariff specifically authorizing every service and every charge, and the tariffs of all the railways should have provided in some manner for the service connected with the operation of a pool, and the demurrage charges in connection with the operation of a pool.

Rules 5 and 6 of Chesapeake & Ohio Tariff I. C. C. No. 9176, filed with the Commission May 20, 1922, effective June 24, 1922, read as follows:

"Rule 5.—On coal consigned to the Newport News, Va., Coal Exchange, Incorporated, Newport News, Va., for account of its members, the following will govern:

"The Chesapeake & Ohio Railway Company will submit a statement to the Exchange at the close of each calendar month as required by its tariffs, itemized to show dates of arrival and release of cars, covering total demurrage accruing against the Exchange during the month. The Exchange will compile car or tonnage days detention accounts against each member and apportion to each member having car or tonnage days detention during the calendar month in which the demurrage accrued, his proportion on the basis of his car or tonnage days detention, as compared to the total car or tonnage days detention. Bills to individual members will then be rendered by The Chesapeake & Ohio Railway Co., in accordance therewith, and payment must be made by members immediately on receipt of bill.

"Rule 6.—Members shall sign an agreement on Exchange Form 'C' to the effect that they will be responsible for, and pay to the carriers all freight charges (when waybilled collect) and vessel loading charges and pay to the Chesapeake & Ohio Railway Co., the assigned proportion of any demurrage charges for their account, this agreement reading as follows:

"I (or we) hereby agree to pay all freight charges, when waybilled collect, loading charges, and car demurrage charges assigned to me (or us) by authority of the Commissioner or Deputy Commissioner of the Newport News Coal Ex-

change, Inc., on coal shipments going into vessels for my (or our) account at Newport News, Va., under the Newport News Coal Exchange, Inc., Agreement, whether shipped from mines, or obtained elsewhere, or for my (or our) account, or for the account of any other member of the Exchange."

The above rules, inserted in C. & O. tariff I. C. C. 9176, are steps in the right direction, and recognize the statutory obligation.

Of course, it is quite obvious that these Rules 5 and 6 do not completely cover the entire subject of services and demurrage charges in connection with the operations of a pool. However, they show a greater effort than was attempted by Norfolk & Western tariff I. C. C. 2828-B, which contains nothing whatsoever on the subject.

It is more than doubtful whether the services growing out of operating a pool of coal could be performed at all without specific tariff authority.

Davis v. *Henderson*, 266 U. S. 92, *C. & O. R. Co.* v. *Westinghouse, etc. Co.*, 270 U. S. 260, and numerous cases cited in Section III herein.

There is nothing in the record explaining how the Norfolk & Western Railway kept its demurrage books. There are various statements by counsel on the briefs, but no testimony in the record.

The books were kept on the theory that one member of the pool dumped coal belonging to another member. It is said throughout the decisions below that A would dump coal belonging to B.

The books were not kept on the true basis of fact that all the members of the pool were tenants-in-common in a mass of fungibles, and that when one

member dumped coal from the pool, he thus partitioned his share and dumped his own coal and not that of some other member.

If the books had been kept on the true basis of fact, reflecting the tenancy in common, and the partition by a member of his own share when dumping took place, and not on the fanciful, fallacious theory of A dumping B's coal, the difference in the resulting final accounts would be profound, both as to amounts and as to the party to be charged.

Correct books would show that a pool member tenant-in-common had partitioned and dumped his own coal. They would show the history of the arrival and dumping, and release of the cars, taken from the books of original entry, and would show the demurrage for undue delay computed on these cars, and would charge same against the dumping member. The railway has a lien on the coal for demurrage charges, just as a ship has a lien for demurrage on the cargo, and an action *in personam* against the owner of the cargo.

Correct books would not show these cars carried on the accounts in the name of someone else, and demurrage charged to someone else, as is done in the case at bar, growing out of ignoring the nature and effect of pooling coal, the great basic fact in the case.

At pages 28 to 84, inclusive, of the record, appear certain exhibits introduced by the railway.

These are a species of ledger accounts, and not the books of original entry, such as waybills, talley sheets, etc.

These exhibits show, or if not, they are explained by counsel to show, certain cars in which Emmons

Company had loaded coal at the mines. Emmons Company pooled the coal as it passed Bluefield. The coal, after reaching Lambert's Point, was dumped by a pool member other than Emmons Company—name not given, and dumping date not given.

These exhibits, together with counsel's explanation, show that the coal in these cars, and the cars themselves, were treated as belonging to the Emmons Company, and not to the pool member tenant-in-common who actually dumped them.

These exhibits, together with counsel's explanation, show that these cars were carried in the demurrage accounts against Emmons Company, and demurrage was charged against Emmons Company.

These exhibits, together with counsel's explanation, show that the transaction was not treated as closed on the demurrage books when a pool member tenant-in-common in this mass of fungibles partitioned his own coal, and dumped his own coal, from his own cars containing same, but the cars, or rather, the ghosts of these cars, were thereafter continued to be carried against Emmons Company on the demurrage accounts until "equivalent tonnage was actually delivered."

So, under this method of bookkeeping, which wholly ignores the nature and effect of the pool, we have demurrage charged against a party other than the owner of the coal and the cars. The transaction is not closed when the party dumps his own coal from his own cars, but demurrage is permitted to continue and increase on the books, not against the owner of the coal and the cars dumped, but against someone else.

The demurrage is charged against Emmons Com-

pany, which never owned the coal or the cars, individually, except between the time the shipments were passing from the mines to Bluefield, West Virginia.

When the coal reached Bluefield, it went into the pool and was owned by Emmons & Company as tenants-in-common with all other members of the pool, and this status continued until the coal was segregated and partitioned from the pool by the dumping member.

It became the individual property of the dumping member at the moment of partition, who could give and did give good title to the purchaser in Europe or elsewhere.

Emmons Company had no right, title or interest in, or relation whatsoever to, the coal or the cars containing the coal, after the moment of partition by the dumping member.

Emmons Company is certainly the wrong party to charge with demurrage on these cars.

Emmons Company had nothing whatsoever to do with the coal, or the cars, after partition from the pool.

The books, as kept by the railway, result in charging the wrong party.

The books, as kept by the railway, result in charging the wrong amount of demurrage.

These things are far deeper and more serious than mere matters of bookkeeping.

They are not the result of a simple change or substitution of "dates."

When properly applied, we have no quarrel with the Commission when it states: "The substitution of dates is merely a bookkeeping arrangement" (85 I. C. C. 395, 399).

This is a labor-saving accounting device, and works out all right when rightly applied.

It is rightly applied, and can only be rightly applied, with respect to dumping by the *same* shipper.

It has no application to the operations of numerous shippers in a pool—tenants-in-common.

The tariff itself distinctly confines substitution of "dates" to cars delivered *"on shipper's order"* (R. p. 16).

All the courts hold that substitution of "dates" relates only and solely to cars of the "same consignee."

In the Pan Handle case, 143 Va. 865, 873, after quoting the passage relating to substitution of "dates," from N. & W. tariff I. C. C. 2828-B (R. 15-16), the Court says:

> "* * * the substitution here provided for relates to cars of the same consignee" (143 Va. 865, 873).

The Circuit Court of Appeals for the Third Circuit, in the case at bar, says:

> "It will be remembered that rule 3(b)2 of the demurrage tariff, quoted supra, allowed a substitution of a car of a shipper of later arrival for one of earlier arrival at the point of trans-shipment, and by the agreement of the members of the Exchange, a further substitution of the car of one member for that of another was permitted" (R. p. 177).
> *Emmons Coal Min. Co.* v. *N. & W. Ry. Co.*, 3 F. (2d) 525, 527.

The attempt to apply a tariff rule applicable only and solely to the *"same* consignee"—a single indi-

vidual—to numerous shippers belonging to a pool as tenants-in-common, something not covered by the tariff, and never contemplated by it, is disastrous and fatal to shippers in a pool.

The tariff does not say a word about substitution of "cars," as stated by the Court of Appeals in the above quoted passage. It does, however, provide for a substitution of "dates."

A most important and seriously different thing.

Substitution of "dates" in the case of the "*same* consignee"—a single individual—leaves another car actually standing on the yards in place of the one dumped.

Substitution of "dates" in connection with the operation of numerous shippers in a pool as tenants in common, does not leave another car standing on the yards in place of the car dumped.

The car is rolling from Bluefield and does not reach Norfolk terminals for a period of from four to twelve days.

Of course, if the demurrage account is kept by the railroad with the "pool" as a "single shipper," and the substitution of "dates" is confined to cars actually on the yards, and "releases" made on a car against car basis and not on a car against "equivalent tonnage" basis, there is always a car left standing on the yards in place of the one dumped.

This method was employed by every railroad except the Norfolk & Western.

It was employed in the Newport News Coal Exchange by the Chesapeake & Ohio Railroad; in the Sewell's Point Coal Exchange by the Virginian Railway Company; in the Tidewater Coal Exchange by the Baltimore & Ohio Railroad Company.

As we have already pointed out, the bookkeeping methods of Norfolk & Western Railway were entirely different from every other railroad operating a coal pool, and it alone did not employ the method of keeping the demurrage account with the "pool" as a "single shipper," as was the practice of every other railroad.

With respect to the theory of continuing to charge demurrage on the railway books until "equivalent tonnage was actually delivered," we wish to note that the unit of demurrage charges is always "the single car" (*Kittaning case*, 253 U. S. 319, 324).

One hundred tons may be dumped from a single car of 100 tons capacity. The demurrage charge is $2.00 per day per car.

One hundred tons—"equivalent tonnage"—may be dumped from two cars each of 50 tons capacity. The demurrage charge is then $2.00 per day for each car, or $4.00 per day for the two cars, although containing "equivalent tonnage."

Tonnage and demurrage charges do not balance, and cannot be balanced.

This fallacious theory has resulted in erroneous demurrage charges to these shippers.

It is very plain that if 100 tons contained in two cars of 50 tons capacity each are dumped, and 100 tons "equivalent tonnage" are "released" on the demurrage account contained in one car, of earlier arrival, of 100 tons capacity, only one car is "released," whereas two cars were dumped, and only the one car "released" on the accounts, is left standing.

So that, it is not true that there is always a car left standing on the yards in place of a car that was

dumped. Two cars may be dumped, and only one car of "equivalent tonnage" left standing.

This actually happened every day, and many times a day, in practice.

When applied to the average ship's cargo of 5,000 tons, it happened daily, and many times daily, and the error assumed serious proportions.

This is readily seen. For example, a pool member dumps 5,000 tons from 100 cars of 50 tons capacity each. The coal clerk's office, in making out the demurrage bill, charges off 5,000 tons, "equivalent tonnage," contained in 50 cars of 100 tons capacity each, and "releases" only 50 cars, although 100 cars have been actually dumped.

So that, it is not true that there is always a car left standing in place of the car that was dumped.

In this example, which was of daily occurrence, 100 cars were dumped and only 50 cars left standing after "release" on the demurrage record.

The demurrage charges of $2 per day per car go on increasing, on the 100 cars dumped; that is, at the rate of $200.00 per day, although only 50 cars are left standing in place of the 100 cars dumped.

An actual example is furnished by the Virginian Railway.

The Virginian had some cars of 120 tons capacity and desired to charge demurrage on the "equivalent tonnage" theory.

They thought it only fair to charge $4.00 per day demurrage, when 120 tons were dumped from one of these large cars, because if "equivalent tonnage" was dumped from two cars of 60 tons capacity each, the demurrage charge would be $2.00 per day per car, or $4.00 per day for the two cars.

This railway applied to the Commission to be allowed to make the extra demurrage charge on each 120-ton car.

The Navy Department filed objections, contending that the unit of demurrage charges was "the single car," irrespective of capacity.

Upon further consideration, the Virginian Railway saw the light, and withdrew its application, and has ever since continued to assess demurrage on "the single car" basis, irrespective of capacity; and when a car is dumped another car is actually left standing on the yards in its place.

It is car for car, and not car for tonnage.

Every other railroad does this except the Norfolk & Western.

It is unnecessary to point out that this "equivalent tonnage" theory produces serious errors and excess charges, in addition to the fallacious feature of assessing demurrage against tonnage in transit, producing demurrage charges for "detention that does not in fact exist" (85 I. C. C. 400).

We have already seen that the Norfolk & Western was the only railroad operating a pool, which did not keep its demurrage accounts against the pool as a single shipper, which is the only correct way of keeping an account with a pool.

At pages 362 and 363 of the transcript of the testimony taken before the Interstate Commerce Commission in the case of *Smokeless Fuel Co.* v. *N. & W. Ry Co.*, I. C. C. Docket 13281, Mr. Conrad, one of the principal witnesses for the Railway, testified that during the entire time of the operation of the Lambert's Point Exchange,—that is from June, 1920, to December, 1921, inclusive,—the demurrage bills

amounted to $699,000.00 for all shippers. (pp. 362-364).

He also testified that if the accounts had been kept against the pool,—each pool as a single shipper,—this amount would have been reduced by $250,000.00.

This gives some idea of the enormity of the crucifying injustice to which these shippers have been subjected by this fallacious and fanciful theory of the railway, creating and operating a pool and at the same time ignoring its nature and effect.

The common law duty of a railroad is to deliver cars in the order of arrival.

In *Smokeless Fuel Co.* v. *C. & O. Ry. Co.*, 34 Va. App. 192, 203, in speaking of the Tariff before it in that case, the Court said:

> "Clause (1) of Rule 3(b) plainly refers to the common law duty to dump in the order of arrival." (34 Va. App. 192, 203).

In the case of *Granger* v. *Davis*, 2 F. (2d) 695, 698, the Circuit Court of Appeals for the 6th Circuit held that it was the common law duty of the railway to dump cars in the order of arrival.

In the case of *Lehigh Silk Dyeing Co.* v. *Director General*, 77 I. C. C. 39, the syllabus reads:

> "Demurrage charges at Allentown, Pa., on certain interstate shipments of bituminous coal found not unreasonable or otherwise unlawful, except insofar as they exceeded the charges which would have accrued if the shipments had been placed in the order of their arrival. Refund directed and complaint dismissed."

Lehigh Silk Dyeing Co. v. *Director General*, 77 I. C. C. 39.

The Norfolk and Western Railway, in the case at bar, recognizes its common law obligations to deliver cars in order of arrival,—the earliest arrived car to be first delivered or dumped.

But, where thousands and thousands of cars were being handled, as was the case at Lambert's Point, the expense of switching cars out in order of arrival would run into hundreds of thousands of dollars. To save itself this expense, and to expedite the movement of cars, the Railway inserted in its Tariff, Rule 3 (b) 2, (R. 16), which reads in part as follows:

> "2. To avoid delay that would be entailed in switching out and delivering on shipper's order, in actual sequence of arrival, cars containing the same grade of coal," etc.

It thereupon proceeded to dump cars from the pool, irrespective of the order of arrival, and irrespective of "their proprietary identity"—to again use the phrase of Judge Learned Hand—and thus saved itself hundreds of thousands of dollars in expenses, and gained the benefit of expeditious handling of cars, coal and vessels.

But, when it came to keeping its demurrage books and accounts, it took away from the shipper all benefits of the pool by not keeping its demurrage accounts with the pool as a single shipper, which is the only correct way of keeping a demurrage account with a pool, and which method was employed by every other railway operating a pool except the Norfolk and Western.

In other words, it operated the cars and coal, physically, as a pool, and exempted itself to use its

own words, from its common law duty to deliver cars "in actual sequence of arrival," saved itself hundreds of thousands of dollars, and then immediately proceeded to ignore the existence, nature and effect of the pool on its demurrage accounts, insofar as the shipper was concerned.

Thus, by this erroneous and fantastic conception, it assessed demurrage against these shippers in the sum of $250,000.00 in excess of what the demurrage charges would have been if the accounts had been kept so as to reflect the basic fact of the existence of the pool, which it was actually operating daily in the physical handling of the cars and the coal.

It is interesting to note that Exchange Rule 31 (R. 25) for assessing "car demurrage," which was not filed with the Commission, provides: "Detention will be computed by subtracting the date of arrival of cars shipped from the date of release of *equivalent cars.*"

This is right, and if it had been applied, the demurrage would have been assessed on the correct demurrage unit of "the single car."

But the tariff rule, 3(b)2 (R. 16), which was used, provides: "The dates on which cars should have been released (as indicated by the record) will be substituted for the dates on which *equivalent tonage* was actually delivered."

A very different, wholly erroneous, unreasonable and impossible thing.

Single cars of varying capacity cannot be balanced against tonnage, and, as we have seen above, it frequently happened, and inevitably happened, that no car was left actually standing in place of

the one dumped, and demurrage was assessed for detention that did not in fact exist.

In passing, we desire to comment upon this curious thing:

The so-called "substitution clause of the Coal Exchange rules" (R. 21, Exchange Rule 15) was used by the Commission and the courts, although not on file with the Commission and not published.

If this unpublished rule of the Coal Exchange could be used, it is difficult to perceive why Exchange Rule 31 (R. 25), as to "*equivalent cars*" should not be used.

We contend no rule of the Exchange could be used, because not on file with the Commission and not published according to law.

But if they are to be used *vi et armis* we prefer the car for car rule of the Exchange signed and agreed to by the shippers rather than the "equivalent tonnage" rule of the tariff.

We will later deal fully with this so-called "substitution clause of the Coal Exchange rules," and will show it does not contain anything about "substitution" at all.

III.

Tariff Authorizes Demurrage Charges for Detention Only. Demurrage Assessed "For Detention that Does Not in Fact Exist" Found as Fact by Commission and All Lower Courts; Also Admitted by Railway.

This Lambert's Point Coal Exchange, which was formed by the Norfolk & Western Railway Company, as the Commission states in the *Smokeless Fuel Case*, 85 I. C. C. 395, 396, differs in important particulars from all other coal exchanges; one important difference being that when coal passed Bluefield, West Virginia, the "billing point," 359 miles from Lambert's Point, it would be credited on the books of the Exchange to the account of the member, and he would then be entitled to dump out of the pool coal already at Lambert's Point, not in excess of his total credits in the pool on the books of the Exchange (R. p. 115; Exchange Rule 15).

As the Commission and all the lower courts have decided, this inevitably resulted in assessing demurrage charges on cars "for detention that does not in fact exist" (85 I. C. C. 400).

We cite a passage from the decision of the Interstate Commerce Commission in the case of *Smokeless Fuel Co.* v. *Norfolk & Western Ry. Co.*, 85 I. C. C. 395, finding the fact to be that demurrage was charged notwithstanding there was no actual detention of cars:

> "Let us assume that only two members, A and B, belonged to the pool. On July 1, A received 50 cars which were credited to his account; B

had no cars in the pool. On July 5, 50 cars passed Bluefield, consigned to B and were then entered to his credit in the pool, although they did not reach Lambert Point for several days. On the same day, July 5, a vessel registered for B's coal. Under the pooling arrangement in connection with the substitution rule of the tariff, A's coal was substituted for B's and immediately unloaded into B's *vessel. It will be seen that, until the the arrival of B's cars, no equipment was, in fact, detained at the port,* but nevertheles, demurrage continued to be assessed against A on account of the 50 cars standing to his credit and represented by B's cars in transit.

"Defendant contends that such an illustration is wholly theoretical and that, as a matter of fact, a dry pool, so called, never actually existed. But a dry pool is not necessary to such constructive detention, *for whenever demurrage is assessed against cars actually unloaded on credits based on coal in transit, such demurrage is assessed for detention that does not, in fact, exist until the cars arrive at the port.*" (Italics ours.)

Smokeless Fuel Co. v. *N. & W. Ry. Co.*, 85 I. C. C. 395, 400.

The fact that demurrage is charged to the shipper upon cars not under actual detention, is also clearly found by the Circuit Court of Appeals for the Third Circuit in *Emmons Coal Mining Co.* v. *N. & W. Ry. Co.*, 3 Fed. (2d) 525. That Court said:

"(6) The defendants (below) have attacked the tariff upon which the claim of the railroad company is based, and the practice of the railroad company thereunder from still another angle. It will be remembered that the coal ship-

ped by each member of the coal exchange was credited to him in the exchange when it passed Bluefield, W. Va., and after being so credited, he was entitled to at once order the withdrawal of an equal amount of coal from the exchange, although his own coal would not actually be delivered at Lambert's Point for several days. This arrangement was made possible by the substitution clause of the coal exchange rules. *The defendants have pointed out that this practice enabled the railroad company to charge demurrage, although no actual detention of its equipment beyond the free time had actually occurred. It is true that, when a shipper exercised his right to order an equal amount of coal out of the pool as soon as his own coal had passed Bluefield, his order released cars in the Lambert's Point yard containing coal of another member of the exchange, and there was no actual detention of equipment while his own cars were in transit to Lambert's Point.*" (Italics ours.) *Emmons Coal Min. Co.* v. *N. & W. Ry. Co.*, 3 Fed. (2d) 525, 528-529.

The Norfolk and Western Railway admitted that charges were made "for detention that does not, in fact, exist."

At page 400, 85 I. C. C., the Commission states that the Norfolk and Western computed that in a period of six months there were 8,778 days on which demurrage was charged on cars where there was no detention in fact—all growing out of the peculiar rule of the Lambert's Point Coal Exchange permitting unloading "on credits based on coal in transit." (85 I. C. C. 400). At $2.00 per day, this amounts to $17,556.00, not a negligible sum by any means.

In the testimony taken before the Commission in

this case—*Smokeless Fuel Co.* v. *N. & W. Ry. Co.*, I. C. C. Docket 13281,—it appears that there was never a car standing at the terminals in place of the one dumped against tonnage in transit from Bluefield.

At page 239 of the stenographic notes of the testimony taken before the Commission, in discussing an example of 100 cars passing Bluefield, Counsel for Norfolk and Western, Mr. Rivinus, put the following question to Mr. Gutheim, principal witness for the Railway:

> "Q. And always the railroad had a hundred cars in its hands, although they may not be at the Tidewater Terminal?
> "A. Oh yes."

A demurrage tariff expressly providing charges for detention only, on cars which have "arrived", and are "held", "at Norfolk Terminals", is no authority for the conception that "always the railroad has a hundred cars in its hands, although they may not be at the Tidewater Terminal" and that demurrage may be assessed accordingly.

So we have the Commission, and all the lower courts, finding as a fact, and the Norfolk and Western Company itself admitting, that demurrage charges were assessed "for detention that does not, in fact, exist."

This fact is unanimously found and admitted.

Norfolk and Western demurrage tariff, I. C. C. 2828-B, provides only and solely for the assessment of demurrage charges on account of detention of cars. It does not provide anywhere for the assessment of one cent demurrage unless there has been actual detention of cars.

By reference to Norfolk and Western tariff I. C. C. 2828-B (R. 15-16), printed as Appendix "B" hereto, it is seen that in large black type the opening sentence states in express words that:

This tariff governs "cars * * * *at* Norfolk and Lambert's Point, Va."

Immediately below this sentence, we find the following, also in large black type:

"Rule 1. Cars Subject to Rules."

Then follows:

> "Cars containing anthracite coal, bituminous coal, coal briquets or coke, for trans-shipment direct to vessels either cargo or fuel supply or to be stored for shipment by vessels when *held* for or by consignors or consignees for unloading, forwarding directions, or for any other purpose, are subject to these rules, * * *."

The use of the word "held" should be noted. Unless the cars are "*held*," and unless they are "*at* Norfolk Terminals," the tariff expressly and obviously does not apply.

In a Note published in the tariff, Norfolk Terminals are defined as consisting of a system of main and connecting side tracks extending from Mile Post 8, at the western boundary of said terminals, to the piers and tracks adjacent at Lambert's Point.

This Note states: "Coal, coal briquets or coke for delivery to vessels *held in cars on tracks within the boundaries of Norfolk terminals* is available for delivery to the piers upon customary notice of owner."

It will be observed that the phrase used is: Coal, etc., "*held* in cars on tracks within the boundaries of Norfolk terminals * * *."

The tariff expressly applies only to cars "*held* * * * within the boundaries of Norfolk terminals."

Rule 2 of the Tariff explains "free time allowed."

Rule 3 of the Tariff applies to "computing time." Beginning "from the first 7 A. M. after the day on which notice of *arrival* is sent or given." No demurrage is assessable, prior to "arrival" at Norfolk Terminals.

Rule 4 of the Tariff is entitled "Demurrage Charges," and explains how same are to be computed.

As the Commission says, this rule provides a "monthly period for adjusting debits and credits." (58 I. C. C. 34). To same effect see *Kittaning case*, 253 U. S. 319, 324.

There is not a word in the tariff, other than with reference to cars "held" or detained "at Norfolk Terminals."

There is not a word in the tariff authorizing the assessment of demurrage "against cars actually unloaded on credits based on coal in transit." (85 I. C. C. 395, 400.)

There is not a word in the tariff authorizing the assessment of demurrage "for detention that does not, in fact, exist." (85 I. C. C. 395, 400.)

But, demurrage was assessed "for detention that does not, in fact, exist."

This has been unanimously found, as a fact, by the Commission and all the lower courts, and has been admitted by Norfolk and Western Railway Company.

Demurrage charges "for detention that does not, in fact, exist" (85 I. C. C. 395, 400) has been adjudged to be due and payable by these shippers.

Yet, there is no tariff authority for same.

The law that no charges can be made or collected, and that no service can be rendered without specific tariff authority, is plain, and it has been so decided in almost innumerable cases by this Court.

These cases have never been overruled, and cannot be ignored.

The point we are now making is with respect to the illegality of the charge, and not with respect to its reasonableness, although we may say in passing that we deny the reasonableness of a demurrage charge imposed for no detention, in fact, and will deal with that subject later, claiming that it is a taking of property without due process of law, and is confiscatory.

> "* * * A charge may be perfectly reasonable under Section 1, yet may create an unjust discrimination or an unreasonable preference under Sections 2 and 3."
> *I. C. C.* v. *B & O. R. R. Co.*, 145 U. S. 263; 36 L. ed. 699, 704.
> *American Express Co.* v. *Caldwell*, 244 U. S. 617; 61 L. ed. 1352.
> *U. S.* v. *I. C. R. Co.*, 263 U. S. 315; 68 L. ed. 417.

So charges may be perfectly reasonable under Section 1, and yet be unlawful under Section 6 of the Commerce Act, because, in the language of the Act, they are not "charges which are specified in the tariff filed and in effect at the time" (41 Stat. L. 483).

Unless a charge is "specified in the tariff filed," it cannot be made at all. The law forbids it, under penalty of fine or imprisonment, or both, in the discretion of the Court.

Norfolk & Western Tariff I. C. C. 2828-B provides for demurrage charges in cases where cars have been detained beyond the free time. It does not provide for demurrage charges where there has been no detention.

In a Note * below, we print paragraph 7, Section 6, Transportation Act, 1920 (Act to Regulate Commerce).

In the case of *Davis* v. *Henderson*, 266 U. S. 92, 69 L. ed. 182, it is held that where the tariff provides for a *written notice* given by a shipper, to have a

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* Note: "No *carrier*, unless otherwise provided by this Act, *shall engage or participate in the transportation of passengers or property*, as defined in this Act, *unless the rates, fares, and charges* upon which the same are transported by said carrier *have been filed and published in accordance with the provisions of this Act;* nor shall any carrier *charge or demand or collect or receive a greater or less or different compensation* for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs *than the rates, fares, and charges which are specified in the tariff filed and in effect at the time;* nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges, so specified, *nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: Provided*, That wherever the word 'carrier' occurs in this Act, it shall be held to mean 'common carrier'' (24 Stat. L. 381, as amended by 25 Stat. L. 856, 34 Stat. L. 587, 41 Stat. L. 483)." (Italics ours.)

4 Fed. Stat. Ann. (2d ed.) 421.

car furnished within a reasonable time, no car can be furnished upon an *oral notice*, although it had been the custom for a long time.

In the case of *Davis* v. *Cornwell*, 264 U. S. 560, 68 L. ed. 848, it is held that in the absence of a provision in the tariff that a shipper may order a car to be furnished for loading on a day certain, no such car can be furnished.

In the case of *C. & O. R. Co.* v. *Westinghouse, Church, Kerr & Co.*, 270 U. S. 260, it is held that in the absence of tariff authority providing for the furnishing of a switching engine and crew, the railroad could collect nothing for the same.

In the case of *Southern Railway Co.* v. *Prescott*, 240 U. S. 632, 60 L. ed. 836, it is said:

> "No carrier may extend any 'privileges or facilities' save as they are duly specified."

In the case of *Southern Ry Co.* v. *Reid*, 222 U. S. 425, 56 L. ed. 257, it is held that in the absence of a tariff providing a rate for the shipment of furniture from a point in one state to another state, no such service can be rendered.

In the case of *Moore Stave Co.* v. *Morgan's L & T. R. R. & S. S. Co.*, 41 I. C. C. 472, 473, the Commission says:

> "Under the provisions of Section 6 of the Act, all terminal privileges and facilities extended to shippers must be specifically authorized by tariff and cannot be inferred" (41 I. C. C. 472, 473).

In the case of *United States* v. *Illinois Central Terminal Co.*, 168 Fed. 546, a railroad was fined

twelve thousand dollars for hauling and switching 6 carloads of glass bottles without having any tariff in effect covering the transaction.

In the case of *C. & A. R. Co.*, v. *Kirby*, 225 U. S. 155, 56 L. ed. 1033, it is held that, in the absence of a clause in the tariff providing for a special fast train, none can be furnished, and that a contract previously made to furnish same, is void.

In this connection, it is obvious that the rules and agreements of the Coal Exchange, not being on file with the Commission, cannot be used in any way in computing demurrage.

Tariff rates and services cannot be changed by contract or agreement of any kind, whatsoever, not published.

In the case of *Southern Railway Co.* v. *Prescott*, 240 U. S. 633, 60 L. ed. 836, already referred to above, this Court says:

> "It is also clear that, with respect to the service governed by the Federal statute, the parties were not at liberty to alter the terms of the service as fixed by the Federal regulations. This has repeatedly been held, with respect to rates (*Texas & P. R. Co.* v. *Mugg*, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; *Kansas City Southern R. Co.* v. *Carl*, 227 U. S. 639, 652, 57 L. ed. 683, 668, 33 Sup. Ct. Rep. 391; *Boston & M. R. Co.* v. *Hooker*, 233 U. S. 97, 112, 58 L. ed. 868, 876, L. R. A. 1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D; *Louisville & N. R. Co.* v. *Maxwell*, 237 U. S. 94, 59 L. ed. 853, L. R. A. 1915E, 665, P. U. R. 1915C, 300, 35 Sup. Ct. Rep. 494), and the established principle applies equally to any stipulation attempting to alter the provisions as fixed by the published rules relating to any of the services within the pur-

view of the Act. *Chicago & A. R. Co.* v. *Kirby*, 255 U. S. 155, 166, 56 L. ed. 1033, 1038, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; *Atchison, T. & S. F. R. Co.* v. *Robinson*, 233 U. S. 173, 181, 58 L. ed. 901, 905, 34 Sup. Ct. Rep. 546."
Southern Ry. Co. v. *Prescott*, 240 U. S. 632, 60 L. ed. 836, 839.

The amount is a matter of no importance whatever, whether it be great or small.

In the case of *Pittsburgh, C. C. & St. L. Ry. Co.* v. *Fink*, 250 U .S. 577, 63 L. ed. 1151, only fifteen dollars was involved.

Nevertheless, this Court held that it was a violation of the statute, not to pay this amount, which was prescribed by the tariff. And that a previous settlement by the consignee for a less amount, upon an erroneous bill presented by the railroad, could not prevent the collection of the $15 additional; and that neither the railroad nor the consignee could, by consent, change the exact amount due under the the tariff.

In the case of *Turner, etc., Lumber Co.* v. *C. M. & St. P. Ry.*, 271 U. S. 259, only Forty Dollars ($40) was involved.

The statute provides that the charges collected must be no "greater or less, or different," than the rate prescribed in the tariff.

Parties, Commissions or Courts, are powerless to make any dispensation whatsoever.

IV.

Demurrage Not Recoverable Because Accounts of Railway Were Kept in Such Manner as to Make It Impossible to Show Exact Amount Due, if Anything Was Due.

We have seen that the Commission and all the lower courts have decided that demurage charges have been assessed "for detention that does not in fact exist."

We have seen that Norfolk and Western Railway Co. has admitted this fact to be true.

In the Judgment in the case at bar are included demurrage charges "for detention that does not in fact exist."

Such demurrage charges are illegal and cannot be collected.

It was incumbent upon the Railway Company to prove the exact amount due to it, if anything was due, so that the Court could enter judgment for an amount certain, without the inclusion of illegal and non-collectible charges.

The confessed and adjudged inclusion of illegal and non-collectible items in the total amount claimed, renders it impossible for the Court to know what amount, if any, is due by Emmons Company to the Railway Company, and to give judgment therefor.

Therefore, the judgment is erroneous and invalid.

In the case of *Virginian Ry. Co.* v. *Lake Export Coal Corp.*, 5 Fed. (2d) 496, the Circuit Court of Appeals for the Fourth Circuit, in an opinion by Judge Rose, held that it was the duty of the Railroad Company to show the exact amount due for de-

murrage, and that if its accounts were kept in such manner that this could not be done, it was the fault of the Railway, and no judgment could be recovered against the shipper.

V.

Substitution of "Dates." Tariff Applies to "Same Consignee," Not to Numerous Members of a Pool. Exchange Rules Contain Nothing About Substitution at All.

A great deal was said by the Commission and by the courts below as to the matter of substitution.

> "Around this power of substitution centers the main controversy of the instant case."
>
> *Emmons Coal Min. Co.* v. *N. & W. Ry. Co.*, 3 F. (2d) 525, 527; (R. 177).

We have already seen that the pool members were tenants-in-common in a mass of fungibles and that each member partitioned his own coal from the pool, and dumped his own coal, and there was no substitution.

We have already seen that Norfolk & Western tariff I. C. C. 2828-B applies only to "the same consignee" (143 Va. 865, C. C. A. 3rd Circuit 3 F. (2d) 525, 527; (R. 177); and that the tariff itself distinctly confines substitution of "dates" to cars delivered "on shipper's order." (R. 16). The tariff has no application whatsoever to operations of a pool, composed of numerous shippers.

In addition to applying only to "*the same consignee,*" it fails to contain specific authority for performing the service of a pool.

Wherefore, the Commission and all the courts resorted to the so-called "substitution clause of the Coal Exchange rules."

The Circuit Court of Appeals for the Third Circuit says:

> "It wil be remembered that the coal shipped by each member of the Coal Exchange was credited to him in the Exchange when it passed Bluefield, West Virginia, and after being so credited, he was entitled to at once order the withdrawal of an equal amount of coal from the Exchange, although his own coal would not actually be delivered at Lamberts Point for several days. *This arrangement was made possible by the substitution clause of the Coal Exchange rules.* The defendants have pointed out that this practice enabled the railroad company to charge demurrage, although no actual detention of its equipment beyond the free time had actually occurred. It is true that when a shipper exercised his right to order an equal amount of coal out of the pool as soon as his own coal had passed Bluefield, his order released cars in the Lamberts Point yard, containing coal of another member of the Exchange, and there was no actual detention of equipment while his own cars were in transit to Lamberts Point." (Italics ours.)

Emmons Coal Min. Co. v. *N. & W. Ry. Co.*, 3 Fed. (2d) 525, 528-529; (R. 179).

Rule 15 of the Exchange (R. 21) is the rule providing for members receiving credit on the books of the Exchange, for tonnage as it passes the billing point, Bluefield, West Virginia, and is the rule referred to by the Court in the above quoted passage from its opinion. We print this Rule in a Note below.*

It will be observed that there is a total absence of any "substitution clause of the coal exchange rules."

We have not overlooked the borrow and loan clause of this Rule 15.

If that clause was in the mind of the lower courts, as authorizing "substitution" of "coal" or of "cars" or of "dates", there is nothing in it to support the idea.

Because, all the pool members, the moment they pooled their coal as it passed Bluefield, became tenants-in-common in this mass of fungibles, and had no separate, ear marked quantity of coal which any of them could borrow from, or lend to, the other.

Each had his "aliquot share in the whole pool dependent upon his proportion of the whole." (284 Fed. 287, 290).

Lending or borrowing $1,000 or anything else, involves no substitution. When a loan is secured, the papers usually expressly provide for substitution of collateral.

In making a loan, a note is usually taken as evidence of a promise to repay the loan. The note is not substituted for the loan.

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* Note:—"15. Coal will be taken into the records of the Exchange daily as it passes billing points. Members shall be entitled to receive coal from a classification on their orders according to priority of vessel register, but no orders for delivery of coal will be executed in excess of the tonnage standing in the name of a member on the Exchange records. Members, however, may enter into borrow and loan transactions as may be mutually advantageous to themselves, and the Manager shall at all times be available to act as an intermediary in such transactions to the extent he may be authorized by individual members." (R. 21.)

This Exchange Rule 15 does not mention the word "substitution".

It does not mention the word "car".

It does not mention the word "date".

There is nothing about any of these things in the Rule.

The total absence of any "substitution clause of the coal exchange rules" furnishes no authority for substitution.

Hence, even if these Coal Exchange rules had been on file with the Commission—which they were not—they would have furnished no authority for substitution of any kind.

If there is anything in the idea of the Court of Appeals that a demurrage tariff can be changed by agreement, or added to in any way by agreement contained in the Exchange Rules not on file with the Commission, then we beg to point out that the agreement which the shippers were required to sign, under Rule 17 of the Exchange (R. 22), expressly provides for "release of equivalent cars" and not for "equivalent tonnage", as stated in the tariff.

In other words, the agreement was not as to "equivalent tonnage."

The minds of the parties never met on that point, but the agreement was for "release of equivalent cars".

Of course, our position is that the Exchange Rules, not being on file with the Commission, could not be used for any purpose whatsoever, and especially for the purpose of changing or adding to the terms of the published tariffs.

We waive the point that the Railway after forcing the shipper to sign and agree to Rule 17 of the Ex-

change (R. 22) expressly providing for "release of equivalent cars," may have deceitfully and fraudulently published its tariff on the "equivalent tonnage" basis.

This comment is not made in a spirit of smallness, but is justified in law.

Nevertheless, we think the truth is, that the operating department of this railway, which frames tariffs as to demurrage and the handling of cars, is not informed or educated with respect to the law, and the framing of instruments, and perhaps unintentionally did this contradictory thing.

If it was done intentionally it is fraud and deceit. If unintentionally it is lack of knowledge in the drafting of instruments.

At all events the result and effect of the manner in which the instruments are drawn is disastrous and destructive to these shippers.

These Coal Exchange rules provide for classification of coal going into the various pools, and the keeping of tonnage debits and credits of the various members on the books of the Exchange. They do not purport to keep, and it was never contemplated, that these Exchange books should keep a demurrage account as to cars, and the substitution thereof; and they do not keep any such accounts.

It is unnecessary to say that these Exchange books are different from the railroad books containing the accounts as to demurrage.

Furthermore, it is an impossibility to balance tonnage against demurrage. The unit of demurrage charges is always "the single car." (*Kittaning case*, 253 U. S. 319, 394; 64 L. ed. 928, 930.)

In the case at bar, it is confessed by the railway

that demurrage was not assessed on the basis of "the single car", as required by the decisions of this Court. It is confessed that the demurrage charges and accounts are wrong, in that they are not in accordance with the ruling of this Court, but directly in the teeth of it.

It is confessed that upon the fallacious theory of the railway in creating and operating a pool, and then ignoring its existence and effect, it would be impossible to compute demurrage on the true basis of "the single car". In the testimony taken before the Commission in this case, *Smokeless Fuel Co.* v. *N. & W. Ry. Co.*, I. C. C. Docket 13281, the following appears at pages 234 and 235 of the stenographic notes, and is given by the principal witness for the railway, Mr. Gutheim:

> "Q. (By Mr. Rivinus) Mr. Gutheim, there are one or two additional questions I would like to develop here. Assuming the existence of coal pooling and individual personal liability for demurrage, would it be practicable to assess demurrage on any basis of individual cars?
>
> "A. Not if you are going to operate a pool for the purpose of accomplishing what I believe it is for, and that is a prompt release of cars and minimum switching, because that necessarily involves the handling of cars from the yard to the pier into the vessel out of order."

This testimony, although not in the Record, shows what we have already demonstrated from the Record:—

That demurrage was assessed in the case at bar on the "equivalent tonnage" basis, and not on "the single car" basis.

The demurrage assessed is confessedly wrong.

This testimony also shows what we have already demonstrated from the Record, that is to say, the self-evident impossibility of balancing tonnage against cars, the unit of a demurrage charge being "the single car".

Cars are of different capacities—they may be respectively of 40 tons, 50 tons or 100 tons capacity—yet the demurrage charge is $2 per day per car, irrespective of car capacity.

A member may dump 100 tons of coal contained in a single car of 100 tons capacity. The demurrage charge is $2 per day per car, or $2.00 in all for one day's detention.

He may later dump "equivalent tonnage", to wit, 100 tons, contained in *two* cars of 50 tons capacity each.

The demurrage charge is $2 per day per car, or, in that case, $4.00 in all for one day's detention.

It is impossible, therefore, to balance tonnage against demurrage, the latter being always calculated on the unit of "the single car."

The Exchange books deal with coal tonnage; the railway demurrage accounts deal with car detention.

The two things are incompatible and will not mix, any more than oil and water.

VI.

Conclusions of Law Contradict Findings of Fact. All Demurrage Charged for no Detention, Confiscatory and Unconstitutional. Unconstitutional to Inflict Penalty for no Offense.

The Commission and all the lower courts have asserted that the demurrage charges in these cases were assessed in accordance with the tariff, and that demurrage charges for no detention in fact, are reasonable.

This conclusion of law is contradicted by the findings of fact.

We have seen that Norfolk & Western demurrage tariff I. C. C. 2828B provides demurrage charges for car detention only.

We have seen that the Commission and all the courts below have unanimously held as a fact that demurrage was assesed "for detention that does not in fact exist." (85 I. C. C. 395, 400).

In the case of *United States* v. *N. Y. Central R. Co.*, 263 U. S. 603, 68 L. ed. 471, it was held by this Court that the conclusion of the Commission that the reduced rate fixed by it for interchangeable mileage tickets, was just and reasonable, was contradicted by its findings of fact, and therefore the conclusion of the Commission became one of law and was not binding on the Court.

In *Great Northern Ry Co.* v. *Minnesota*, 238 U. S. 340, 59 L. ed. 1337, and in *Union Pacific R. Co.* v. *Public Service Comm.*, 248 U. S. 67, 63 L. ed. 131, this Court reversed the judgments of the lower courts as a matter of law, on the facts found by the Commission.

In the case of *I. C. C.* v. *B. & O. R. R. Co.*, 225 U. S. 326, 56 L. ed. 1107, it was held that where the facts are undisputed, and the conclusions of the Commission are challenged, a question of law is raised.

The charging of demurrage where there is no detention, is confiscation, and contrary to the 14th Amendment.

In *Davison* v. *New Orleans*, 96 U. S. 97, 24 L. ed. 616, it was held that a statute declaring in terms, without more, that the full and exclusive title to a prescribed piece of land belonging to one person should be, and is hereby, vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the 14th Amendment.

We respectfully submit that a judgment taking away the money and property of shippers for demurrage charges on cars where there has been no detention in fact, is a transfer of money and property of the shipper to the railroad without any compensation to the shipper whatsoever, and without any benefit to the shipper whatsoever, by which he is not only deprived of a fair return on his money and property, but is actually deprived of the money and property itself *in toto*. See also *C. B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 41 L. ed. 979, and numerous cases cited therein.

Furthermore, it is unreasonable, unconstitutional, and not due process of law, to inflict a penalty, when no offense has been committed.

Demurrage is a penalty imposed on account of undue detention of cars.

"The purpose of demurrage charges is to pro-

mote car efficiency by penalizing undue detention of cars." (*P. R. R. Co.* v. *Kittaning I. & S. Mfg. Co.*, 253 U. S. 319, 323, 64 L. ed. 928, 930.)

It has been frequently decided by the Interstate Commerce Commission that demurrage is a penalty, inflicted on account of undue detention of cars.

T. M. Kehoe & Co. v. *C. & W. C. R. Co.*, 11 I. C. C. 166;
Dashields & Co. v. *Director General*, 73 I. C. C. 225;
Hawkins & Sons v. *Director General*, 80 I. C. C. 225;
McGarry & Co. v. *Wabash R. R. Co.*, 88 I. C. C. 301.

Where the claim is made that a charge is confiscatory, there must be a fair opportunity for submitting that issue—

> "* * * to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, 14th Amendment. Missouri P. R. Co. v. Tucker, 230 U. S. 340, 347, 57 L. ed. 1507, 1509, 33 Sup. Ct. Rep. 961; Wadley Southern R. Co. v. Georgia, 235 U. S. 651, 660, 661, 59 L. ed. 405, 411; P. U. R. 1915A, 106, 35 Sup. Ct. Rep. 214; Missouri v. Chicago, B. & Q. R. Co., 241 U. S. 533, 538, 60 L. ed. 1148, 1154, 36 Sup. Ct. Rep. 715; Oklahoma Operating Co. v. Love (March 22, 1920), 252 U. S. 331, ante, 596, 40 Sup. Ct. Rep. 338."

Ohio Valley Water Co. v. *Ben Avon Boro.*, 253 U. S. 287, 289; 64 L. ed. 908, 914.

VII.

Sole Question Construction of Tariff. All Matters of Law Open, Even Though not Raised Below.

The sole question in the case at bar is the construction and application of the tariff. The construction of a tariff is a question of law for the Court. *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 66 L. ed. 943.

Turner etc. Lumber Co. v. *C. M. & St. P. R. Co.*, 271 U. S. 259.

The assignment of errors raises clearly the question of the construction of the tariff, and this question has been pressed all through the case below.

Construction includes matters making an instrument void, and also matters involving the meaning of the phraseology employed.

All propositions of law are open under these assignments of error.

Herein we have advanced propositions of law, which were not brought to the atention of the Commission nor the lower courts.

We regret that these propositions of law were not presented before, and we believe if they had been presented below, the result would have been different. These shippers are victims of world wide calamity, the result of the greatest war in history.

New and additional counsel have been associated in this case very recently, and the situation is somewhat like that in the case of *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 63 L. ed. 1099.

In that case—as pointed out in the sole dissenting

opinion—for twenty-five years, parties had been represented "by counsel of great eminence" and only at the expiration of a quarter of a century did they hit upon the true theory of law governing the case; and this Court decided in an elaborate opinion that they were not barred by laches, and that they would be heard. Relief was granted them.

The matters of law now raised are open under the assignment of errors.

Furthermore, it has been frequently ruled by this Court that a plain error will be corrected, even without an assignment of error.

U. S. v. *Tennessee C. R. Co.*, 176 U. S. 242, 44 L. ed. 452;
U. S. v. *Pena*, 175 U. S. 500, 44 L. ed. 251;
Columbia Heights Realty Co. v. *Rudolph*, 217 U. S. 547, 54 L. ed. 877, citing numerous cases.

Current Rule 25 of this Court is to the same effect.

Delay in raising a point will not preclude decision on appeal. *Southern Pac. Co.* v. *Bogert*, 250 U. S. 483, 63 L. ed. 1099.

A particularly strong case is that of *Fourth National Bank* v. *Francklyn*, 120 U. S. 747, 30 L. ed. 825.

In that case, no reference had been made below to a statute of Rhode Island, which repealed and modified in some respects, the statutes upon which the parties relied below.

This Court held, not only that the point would be considered, but that it would take judicial notice of the statute which had not been referred to below.

VIII.

Judicial Notice.

The demurrage sued for in this case grew out of the failure of the shipper to unload on account of circumstances beyond his control.

All of these circumstances were the direct results of the World War and the financial and trade collapse of 1920-1921, and the disruption of foreign trade.

The court will take judicial notice of these matters and, indeed, the Act of Congress of August 24, 1921 (Fed. Stat. Ann. (2d) Supp. 1921, p. 27) specifically refers to the collapse of foreign trade in 1920-1921, being due to the World War.

We have already called attention to the fact that in the *Mayes case*, 201 U. S. 321, 50 L. ed. 772, which is the leading authority, this Court took judicial notice that conditions might arise which would make it impossible for a railroad to comply with the rigid requirements of the Texas statute, and we have already pointed out that the Supreme Court of Appeals of Virginia, in *Southern Railway Co.* v. *Commonwealth*, 107 Va. 771, 780, 60 S. E. 70, used the following language in this connection:

> The Texas statute " * * * was held invalid on the declared ground that exceptions were not made for cases which might occur, rendering the carrier unable to furnish cars within the time specified; but a careful examination of the printed record in that case fails to disclose any evidence of a washout or sudden congestion of traffic, or unavoidable detention of cars in other states, or in other places in the same state, or any other circumstances which the court de-

cleared should excuse the railroad company from furnishing cars applied for. In other words, the court took judicial notice of the fact that such conditions might arise, and for that reason the statute was 'likely' to do great injustice to the roads, * * *."

Southern Ry. Co. v. *Commonwealth*, 107 Va. 771, 780, 60 S. E. 70.

In a recent case, the Supreme Court of the United States used the following language, showing that the invalidity of a statute may be established by things which will be judicially noticed:

"Invalidity may be shown by things which will be judicially noticed (Quong Wing v. Kirkendall, 223 U. S. 59, 64, 56 L. ed. 350, 352, 32 Sup. Ct. Rep. 192), or by facts established by evidence."

Weaver v. *Palmer Bros. Co.*, Law Co-Op. Adv. Ops. U. S. Ct. 1925-1926, pp. 366, 367, 270 U. S. 402.

In the case of *Bluefield, etc. Co.* v. *Public Service Comm. of W. Va.*, 262 U. S. 679, 67 L. ed. 1176, the court uses the following language with respect to taking judicial notice of increased cost of labor and supplies, as a result of the World War—

"In 1919, this court in Lincoln Gas & E. L. Co. v. Lincoln, 250 U. S. 256, 268, 63 L. ed. 968, 976, 39 Sup. Ct. Rep. 454, declined on the facts in that case, to approve a finding that no rate yielding as much as 6 per cent on the invested capital could be regarded as confiscatory. Speaking for the court, Mr. Justice Pitney said:

> "'It is a matter of common knowledge that, owing principally to the World War, the costs of labor and supplies of every kind have greatly advanced since the ordinance was adopted, and largely since this cause was last heard in the court below. And it is equally well known that annual returns upon capital and enterprise the world over have materially increased, so that what would have been a proper rate of return for capital invested in gas plants and similar public utilities a few years ago furnishes no safe criterion for the present or for the future.'"

Bluefield W. W. & Imp. Co. v. *Public Service Comm. of W. Va.*, 262 U. S. 679, 693-694; 67 L. ed. 1176, 1183.

Courts will take judicial notice of the existence of our Civil War, of acts of war which led to it, and of the general social and financial results which followed it. *Burke* v. *Miltenberger*, 19 Wall. 519, 22 L. ed. 158.

The courts will take judicial notice of orders of the Director General of Railroads, and of the Interstate Commerce Commission, under which, during the period between March 21, 1918, and February 29, 1920, the cost of railroad operations had enormously increased and the rates had been advanced in an effort to provide the increased cost. They take judicial notice, also, of the general change in conditions after February, 1920. *Michigan Cent. R. Co.* v. *Michigan Pub. Utilities Comm.*, 271 Fed. 319.

Courts will take judicial notice of executive proclamations, regulations of Bureaus and Departments, and Reports of Public Officers. *Armstrong* v. *United States*, 13 Wall. 154, 20 L. ed. 641.

Also of executive documents, printed by authority of the Federal Senate. *Whiton* v. *Albany Ins. Co.*, 109 Mass. 24.

Also, of official reports published by authority of the legislature. *Kirby* v. *Lewis*, 39 Fed. 66.

Also, of rules and regulations of the Land Department, as to the sale of public lands. *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S. 301, 47 L. ed. 1064.

> "It is a matter of common knowledge that agreements as to rates have been continuously made of late years between railroad companies, and that complaints of each company in regard to the violation of such agreements by its rivals, have been frequent and persistent."
> *U. S.* v. *Trans-Missouri Freight Asso.*, 166 U. S. 290, 41 L. ed. 1007.

Wherefore, Emmons Coal Mining Company and The Fidelity and Casualty Company of New York pray that this Court will grant a rehearing in said case, No. 70, October Term, 1926, and set same down for reargument together with Pan Handle Coal Company Case No. 299, October Term, 1926, when same is reached for argument.

EMMONS COAL MINING COMPANY,
By J. GREY EMMONS,
Sec.-Treas.

CLAUDIAN B. NORTHROP,
Attorney for Emmons Coal Mining Company.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,
By WILLIAM G. WRIGHT,
Attorney for The Fidelity and Casualty Company of New York.

COMMONWEALTH OF PENNSYLVANIA, } ss:
County of Philadelphia, }

J. Grey Emmons, being duly sworn according to law, deposes and says that he is Secretary and Treasurer of the Emmons Coal Mining Company, a corporation created by and existing under the laws of Pennsylvania, and that he is duly authorized to render this affidavit in its behalf and on behalf of its co-defendant, The Fidelity and Casualty Company of New York; that he has read the foregoing petition for rehearing, and that the same is true to the best of his knowledge and belief.

J. GREY EMMONS.

Sworn to and subscribed before me this 3rd day of February, 1927.

BESSE KIPE,
Notary Public.

[SEAL]

My commission expires at end of next session of Senate.

DISTRICT OF COLUMBIA, } ss:
City of Washington, }

I, Claudian B. Northrop, Attorney for Emmons Coal Mining Company, do hereby certify that the foregoing petition for rehearing is meritorious, and that it is presented in good faith and not for delay.

CLAUDIAN B. NORTHROP,
Attorney for Emmons Coal Mining Co.

COMMONWEALTH OF PENNSYLVANIA, } ss:
County of Philadelphia, }

I, William G. Wright, Attorney for The Fidelity and Casualty Company of New York, do hereby certify that the foregoing petition for rehearing is meritorious, and that it is presented in good faith and not for delay.

WILLIAM G. WRIGHT,
Attorney for The Fidelity and Casualty Company of New York.

INTERVENTION (If Allowed).

Paul L. James and W. Willis Houston, partners trading as Pan-Handle Coal Company, respectfully show unto the Court that they are plaintiffs in error in No. 299, October Term, 1926, in the case entitled Paul L. James and W. Willis Houston, partners trading as *Pan-Handle Coal Company, plaintiffs in error,* v. *Norfolk and Western Railway Company.*

They respectfully show unto the Court that they have, on January 21, 1927, served notice on Attorneys of Record for defendant-in-error, that on Monday, February 7, 1927, or as soon thereafter as counsel can be heard, they will move the Court for leave to intervene in case No. 70, October Term, 1926, wherein Emmons Coal Mining Company, et al. are plaintiffs in error and Norfolk and Western Railway Company is defendant in error, and for leave to join in the petition for rehearing, requesting that cases 70 and 299, October Term, 1926, be argued together.

They respectfully show unto the Court, by their counsel of record, Thomas W. Shelton, Gibbs L. Baker and Claudian B. Northrop, that they hereby join in the foregoing Petition for Rehearing, requesting that

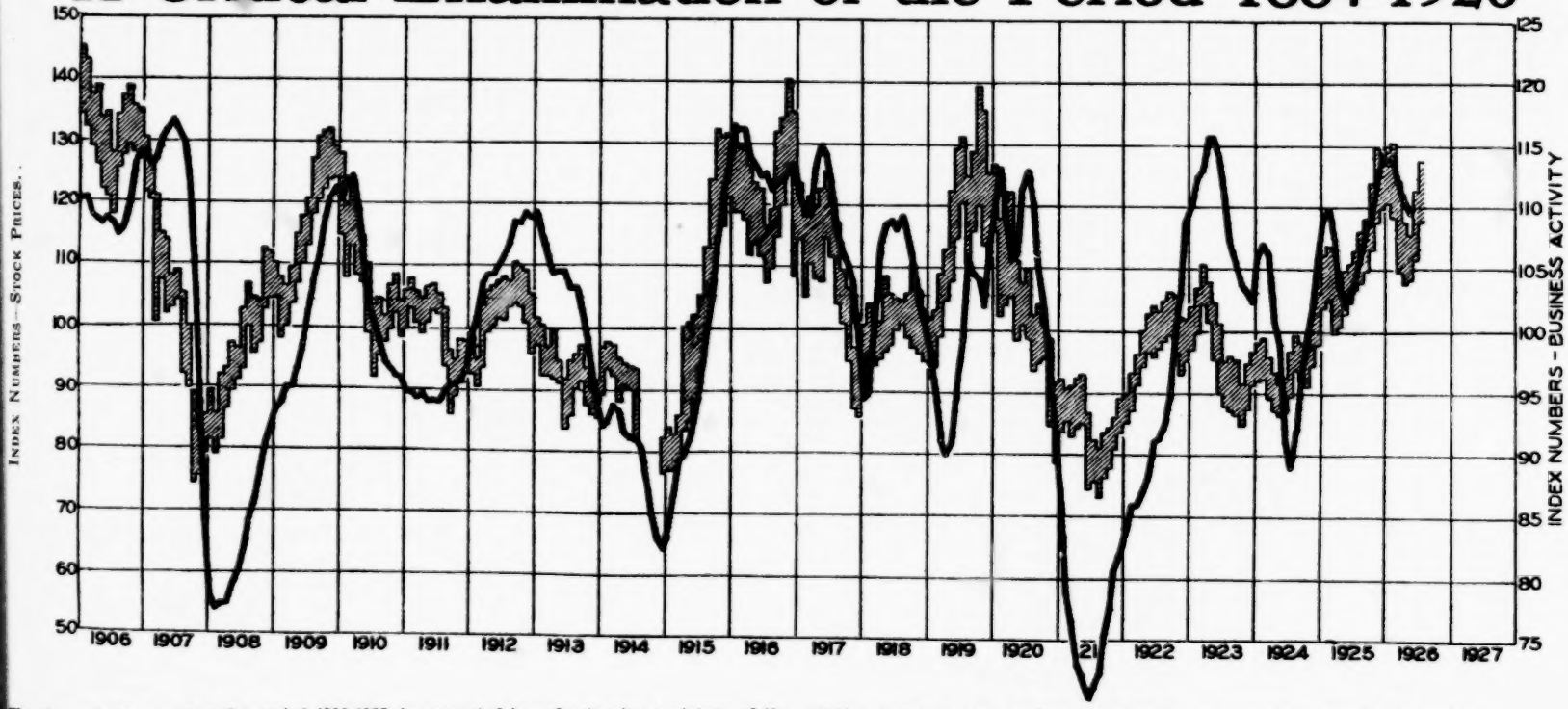
cases numbered 70 and 299 be heard and argued together, if this Court shall grant their Motion to Intervene, and join in the foregoing Petition.

PAUL L. JAMES AND W. WILLIS HOUSTON,
Partners trading as
PAN HANDLE COAL COMPANY,
By THOMAS W. SHELTON,
GIBBS L. BAKER,
CLAUDIAN B. NORTHROP.
Attorneys for Pan Handle Coal Company.

APPENDIX A.

(Published by New York Times Co.)

A Critical Examination of the Period 1884-1926



The above chart, covering the period 1906-1926, is presented in order to give a picture of the relation of stock prices to business activity over the entire period 1884-1936.

No Supplement to this Tariff will be issued except for the purpose of cancelling the tariff.

TARIFF C. & C. No. 4056
Cancels Tariff C. & C. No. 3988

I. C. C. No. 2828-B.
Cancels I. C. C. No. 2808-B.

NORFOLK & WESTERN RAILWAY CO.

DEMURRAGE RULES AND REGULATIONS

GOVERNING CARS CONTAINING

ANTHRACITE COAL, BITUMINOUS COAL, COAL BRIQUETS OR COKE

For Trans-Shipment By Vessel

—AT—

Norfolk and Lambert's Point, Va.

Issued June 25, 1920 **Effective July 1, 1920**

Issued on five days' notice, under special permission of the Interstate Commerce Commission, No. 30172 of June 24, 1920.

Issued by

D. E. SPANGLER, Gen'l. Superintendent Transportation, ROANOKE, VA.

J. R. TALBOTT, Supt. of Car Service, ROANOKE, VA.

J. R. RUFFIN, Freight Traffic Manager, ROANOKE, VA.

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800

DEMURRAGE RULES AND REGULATIONS GOVERNING CARS CONTAINING ANTHRACITE COAL, BITUMINOUS COAL, COAL BRIQUETS OR COKE FOR TRANS-SHIPMENT BY VESSEL AT NORFOLK AND LAMBERT'S POINT, VA.

RULE 1—CARS SUBJECT TO RULES.

Cars containing anthracite coal, bituminous coal, coal briquets or coke, for trans-shipment direct to vessels, either cargo or fuel supply, or to be stored for shipment by vessels when held for or by consignors or consignees for unloading, forwarding directions, or for any other purpose are subject to these rules, except—

(a) Cars reconsigned or reshipped for rail delivery or to another rail destination will be subject to the National Car Demurrage Rules (J. E. Fairbanks, Agent's, I. C. C. No. 4, N. & W. Tariff No. 10001-T), supplements thereto and reissues thereof, from arrival.

NOTE—Norfolk Terminals consist of a system of main and connecting side tracks extending from Mile Post 8 at the western boundary of said terminals to the piers and tracks adjacent at Lambert's Point. Coal, coal briquets or coke for delivery to vessels held in cars on tracks within the boundaries of Norfolk Terminals is available for delivery to the piers upon customary notice of owner.

RULE 2—FREE TIME ALLOWED.

An average of five (5) days per car free time will be allowed, except on coke for export, on which an average of ten (10) days per car free time will be allowed.

RULE 3—COMPUTING TIME.

(a) A notice of arrival must be sent or given to the consignee in writing or as otherwise agreed to by carrier and consignee upon arrival of cars and billing at Norfolk Terminals, Va.

Time will be computed from the first 7 A. M. after the day on which notice of arrival is sent or given to the consignee.

NOTE—In computing time Sundays and legal holidays (national, state and municipal), but not half-holidays, will be excluded. When a legal holiday falls on Sunday, the following Monday will be excluded.

The following are legal holidays:

January 1st	New Years Day
January 19th	Lee's Birthday.
February 22d	Washington's Birthday.
May 30th	Memorial Day.
July 4th	Declaration Day.
First Monday in September	Labor Day.
Tuesday following first Monday in November	General Election Day.
Thanksgiving Day	Generally last Thursday in November.
December 25th	Christmas Day.

(b) A car shall be considered as released:

1. At the time vessel registers for the cargo or fuel supply of which the coal, coal briquets or coke dumped into such vessel is a part, except that when cars are unloaded before the vessel registers such cars shall be released when unloaded.
2. To avoid delay that would be entailed in switching out and delivering on shipper's order, in actual sequence of arrival, cars containing the same grade of coal, as indicated by the identifying consigning names or numbers on the waybills, the dates on which cars should have been so released (as indicated by the record) will be substituted for the dates on which equivalent tonnage was actually delivered and the detention will be computed on the basis of such substituted dates.
3. The dates shipments are transferred by written order and acceptnnce to another party shall be considered the date of release of the car for the account of the original consignee and subsequent detention shall be charged in the account of the new consignee without any free time allowance.
4. Any fraction of a day will be computed as one day.

RULE 4—DEMURRAGE CHARGES.

Settlement shall be made on the basis of detention to all cars released during the month. The date of arrival notice shall be subtracted from the date of release. From the total days detention to all cars thus obtained, deduct all Sundays and legal holidays following the date of arrival and five (5) days free time allowance for each car, except on cars containing coke for export deduct ten (10) days free time allowance for each car: the remainder, if any, will be the number of days to be charged at the rate of $2.00 per car per day. Excess credit days of any one month cannot be deducted from the excess debit days of another month.

Office Supreme Court, U.
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No. 70.

OCTOBER TERM, 1926.

IN THE

Supreme Court of the United States

EMMONS COAL MINING COMPANY AND THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, Plaintiffs in Error,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR NORFOLK AND WESTERN RAILWAY COMPANY, Defendant in Error.

J. HAMILTON CHESTON,
F. M. RIVINUS,
THEODORE W. REATH,
Counsel for Norfolk and Western Railway Company.

NOVEMBER, 1926.

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In the Supreme Court of the United States.

OCTOBER TERM, 1926. No. 70.

Emmons Coal Mining Company and the Fidelity and Casualty Company of New York, Plaintiffs in Error,

vs.

Norfolk and Western Railway Company, Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

I.

OFFICIAL REPORT OF OPINIONS IN THE COURTS BELOW.

Norfolk and Western Railway Company vs. *Emmons Coal Mining Company and the Fidelity*

and Casualty Company of New York, 287 Fed. 168—District Court for the Eastern District of Pennsylvania, 1923 (R. 121).

Emmons Coal Mining Company, et al. vs. *Norfolk and Western Railway Company,* 3 F. (2d) 525—United States Circuit Court of Appeals for the Third Circuit, 1925 (R. 174).

II.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

DATE OF JUDGMENT UNDER REVIEW.

Judgment of the United States District Court for the Eastern District of Pennsylvania entered April 30, 1924, affirmed by United States Circuit Court of Appeals by judgment entered January 10, 1925. (R. 165, 180.)

III.

STATEMENT OF THE CASE.

The terminal yard tracks and piers for the transshipment by vessel of coal moving to tidewater from bituminous fields on the Norfolk and Western Railway, are at Lambert Point, near Norfolk, Virginia. At this terminal prior to the establishment of the tidewater coal pooling arrangement, hereinafter referred to, the Railroad classified and segregated on different tracks

each carload shipment of coal according to grade and consigneeship. Consignees of several grades distinguished them by different consigning names or numbers, necessitating as many classifications as there were grades of each consignee. Upon receipt of an order from a consignee to dump a given quantity of a certain grade of his coal, the Railroad would have already classified and would transfer the specified tonnage to the piers for dumping into the waiting vessel. To avoid the unnecessary labor and delay of picking out and switching to the piers cars of a given consignee containing the same grade of coal, in the order of their arrival at tide, the carrier by tariff rule (which is hereafter referred to as the Substitution Rule) had the right to deliver such cars in any order, releasing the cars, however, on the demurrage record in the order of arrival. Prior to the pooling arrangement only the cars of one consignee were interchangeable under the Substitution Rule.

Transshipment of coal at railroad tidewater terminals entails the practical problem of assembling carload units into cargoes and bunker lots with as little delay as possible to cars or vessels. In war time was developed the scheme of pooling cars of the same grade, so that carloads of coal of a given grade might be dumped on the order of any consignee who had on wheels

sufficient coal of that grade, without regard to the ownership of particular cars. The coal was not pooled in the sense of being dumped into storage bins, but remained in the cars. Thus by agreement the cars of different owners containing the same grade of coal became interchangeable under the Substitution Rule. An important object attained by pooling was the reduction of the number of classifications to the number of different grades of coal (no longer multiplied by the number of consignees).

Any pooling scheme requires an agreement among the transshippers (consignees) and with the Railroad. An arrangement for the pooling of coal shipments at the Lambert Point terminal of the Norfolk and Western was created through the organization of the Lambert's Point Coal Exchange in June, 1920.

This suit was brought by the Norfolk and Western Railway Company in the Federal District Court for the Eastern District of Pennsylvania against the Emmons Coal Mining Company and the Fidelity and Casualty Company of New York, as surety, to collect demurrage on carload shipments of coal consigned to Emmons in care of Lambert's Point Coal Exchange, Virginia, for transshipment by vessel during the period September, 1920,-March, 1921, inclusive. The Emmons Company was a member of the

Lambert's Point Coal Exchange during that period (R. 8-10).

The members of that Exchange agreed to the swapping of coal of the same grade and so informed the Railroad. The agreement was not confined to coal already arrived on the terminal yards,—coal passing Bluefield, West Virginia, the billing point of origin of all Norfolk and Western tidewater coal, was reported to the terminal by wire and entered on the Exchange books to the credit of the consignee. The latter could immediately draw equivalent coal over the terminal piers on the strength of such credits (R. 21-22).

An Exchange Manager kept books to show the amount of coal of each grade which had been entered to the credit of each Exchange member. Withdrawals of coal from the pool were likewise charged in these books so that at any given point of time each member's deposit balance appeared. Of necessity, for prevention of overdrafts, orders for disposition of members' coal deposits had to be handled by the Exchange Manager. Accordingly each member of the Exchange gave power of attorney to the Exchange Manager to transmit to the railroad orders for dumping the equivalent of the member's deposit. Copies of these powers of attorney were filed with the railroad agent at the terminal (R. 21-22).

The individual transshipper could voluntarily join the Lambert's Point Coal Exchange or he could stay out of it. Whether he joined or stayed out he was responsible, under the demurrage tariff, for detention of coal cars at the piers. In either case the substitution rule in the demurrage tariff required the railroad to release his cars on the demurrage record in sequence of their arrival upon the dumping on his order of equivalent cars of his own ownership (outside of the Exchange) or of equivalent cars without regard to ownership of them (as in the case of Exchange members) (R. 22-25).

The questions of tariff application and reasonableness and of law proposed in this appeal have been passed upon by the Interstate Commerce Commission in a proceeding instituted by this plaintiff and other members of the Lambert's Point Coal Exchange: *Smokeless Fuel Company,* et al. vs. *Norfolk and Western Railway Company,* 85 I. C. C. 395. The interpretation of the same tidewater demurrage tariff in its application to the status created by the rules of Lambert's Point Coal Exchange was examined by the Commission. The assessment of the charges for which the Railway Company is here suing was found correct and in accordance with the tariff, and the tariff itself was deemed reasonable.

Authority for reliance on the Interstate Commerce Commission's interpretation of this tariff, as expressed in the Commission's decision,—85 I. C. C. 395, above-noted,—is shown by the following extract from an opinion by the Circuit Court of Appeals for the Eighth Circuit, in *Davis, Director General of Railroads,* vs. *Prairie Pipe Line Company,* 298 Fed. 393, at page 397:—

> "The construction of a freight tariff is a question of law. * * * We are not bound, of course, by the finding of the Commission as to a matter of law; but it is a board with special experience and knowledge concerning these rate questions, and its decisions are helpful to the courts in arriving at correct conclusions."

Concurrently with the present suit and with defense of the complaint before the Commission, this Railway Company brought suit in the Circuit Court of the City of Norfolk, Virginia, for demurrages against another member of the Lambert's Point Coal Exchange,—P. L. James and W. W. Houston, partners trading as Pan Handle Coal Company. The Railway Company's declaration,—termed under the Virginia practice a notice of motion for judgment,—was substantially identical with the statement of claim herein, and as in this case the questions therein raised, were

decided in favor of the Railway Company in two unreported opinions by the Hon. Allan R. Hanckel. On appeal to the Supreme Court of Appeals of Virginia, judgment for the Railway Company for the amount of damages assessed and sued for as in this case was affirmed: *James*, et al. vs. *Norfolk and Western Railway Company*, 129 S. E. 321 (Va. 1925).

IV.

ARGUMENT.

A. SUMMARY.

The Assignments of Error in this case appear at pages 182-183 of the record. The substance of the assignments may be grouped and argued under three heads.

1. The members of the Lambert's Point Coal Exchange were the consignees of the coal and were responsible individually for demurrage.

Assignments of Error 1, 3, 4, 5, 6, 7, and 8. (R. 182-183.)

2. The demurrages sued for are computed with sole reference to the governing demurrage tariff.

Assignments of Error 1, 3, 4, 5, 6, 7, and 8. (R. 182-183.)

3. The discharge of the rule for information was proper.

Assignment of Error 2. (R. 182.)

B. ARGUMENT.

B.-1. The members of the Lambert's Point Coal Exchange were the consignees of the coal and were responsible individually for demurrage.

Assignments of Error 1, 3, 4, 5, 6, 7, and 8.
(R. 182-183.)

The question is who was the consignee of the coal,—the individual shipper or the Lambert's Point Coal Exchange?

Under the governing demurrage Tariff I. C. C. No. 2828-B (R. 16), cars are subject to demurrage "when held for or by * * * consignees for unloading, forwarding directions, or for any other purpose," with exceptions not applying in the present case. All coal shipments moving through the Exchange are billed,—as required by Rule 23 of the Articles of Organization and Rules of the Lambert's Point Coal Exchange (R. 17),—to the individual members in care of the Exchange. For example, "To Emmons Coal Mining Company, care of Lambert's Point Coal Exchange, Pool 1." Rule 23 requires that the shipping instructions

> "shall show as the consignee the name of the member for whose account shipped followed by the words 'care Lamberts Point Coal Exchange Pool '"

Consignments made by Emmons Coal Mining Company were so billed. Where a shipment is

consigned to "A" care of "B," "A" is the consignee. Section 676 of Volume 2, 3d Edition of Hutchinson on Carriers, reads:—

> "Goods shipped to one person as consignee in care of another should be delivered to the consignee, and, in case he cannot be found, then to the one in whose care they are shipped."

Schlesinger vs. *West Shore R. Co.*, 88 *Ill. App.*, 273, was a suit to recover the value of five barrels of whiskey shipped from New York to "B. H. Kemper, Chicago, Ill., care Berkenfield Ex." The plaintiff complained of a delivery to Kemper without surrender of the bill of lading, but the Appellate Court, in affirming a directed verdict for the Railroad Company, defendant, said, at page 276:—

> "Now * * * Kemper, in this case, was the consignee, and being so the title to the whiskey was vested in him," etc.

And again, at page 277:—

> "It is not claimed that there were any conditions or qualifications connected with the delivery of the whiskey by appellants to the carrier beyond the fact that, as expressed on the face of the bill of lading, it was consigned to Kemper, in the care of Berkenfield's express.
>
> "Kemper was the consignee."

The form of consignment in *United States Express Company* vs. *Hammer,* 21 Ind. App., 186, was "For R. C. Hammer, Indianapolis, Ind., in care of American Express Co.," and Hammer complained of the Express Company's refusal to make delivery to him. The Court held that he was consignee and entitled to the property. Other cases recognizing that the consignee is the person to whom the property is addressed and not the "in care of" party are *Great Lakes Coal and Dock Co.* vs. *Seither Transit Co.,* 220 Fed. 28-C. C. A.-8-1915; *Hoops* vs. *Wells Fargo & Co.,* 176 Ill. App., 620; *Commonwealth* vs. *People's Express Co.,* 88 N. E., 420; and *Ela* vs. *American Merchants' Union Express Co.,* 29 Wis., 611. The law accords with common usage generally. Thus a letter as well as a shipment addressed to A in care of B is intended for A, not B.

By the Exchange Agreement the transshipper has all the effective rights of a consignee (R. 17). By Rule 23 he consigns to himself, not to the Exchange. By Rule 14 he places orders for delivery of coal to vessels with the Manager of the Exchange; by Rule 15 he is "entitled to receive coal from a classification on" his order up to "the tonnage standing in" his name. By Rule 17 the members of the Exchange, including this transshipper, agree to pay any demurrage ac-

cruals under the tariff of the Railway Company for car days' detention, to be computed by subtracting the "date of arrival of cars shipped for account of the undersigned from the date of release of equivalent cars." The only function of the Exchange Manager is to police the integrity of the pool, and he must without discretion transmit the dumping order of a member to the Railway Company after ascertainment only of the fact that the ordering member has a sufficient deposit of coal in the pool to satisfy his order.

The Exchange was organized for the sole purpose of expediting transshipment by swapping of equivalents—not to assume any of the transshippers' obligations to the carrier. Emmons' argument would make the carrier look for its demurrage charges to an entity without assets, and without anyone secondarily and ultimately liable therefor.

Emmons urges that the Exchange is to be deemed the common consignee of all shipments to its members in its care. He insists upon the conclusion that the Exchange Manager has complete possession and control of the coal and the Exchange member, by the same sign, has no control. But the conclusion is contradicted by the form of consignment and (as we have seen) by the legal effect of the form of consignment; and is contradicted also by the Exchange Rules,

as above noted. The transshipper's possession and control of his coal is recognized in the fact that he can at any time up to the moment of actual dumping of the particular car consigned to him reconsign that car either in transit or after arrival at Lambert Point terminal. Rules 6 and 26 of the Exchange contemplate reconsignment by the member of cars already taken into the pool books (R. 19, 24). Of necessity, however, to protect the pools from overdrafts, reconsignment orders must pass through the Exchange Manager so that the reconsigned car may be removed from the member's Exchange account. The Circuit Court of Appeals in this case held as matter of law that the documents constituted the individual transshipper the consignee liable for demurrage. The Court said at page 528 of the reported opinion (R. 178):—

> "The defendant below also seeks to avoid liability upon the demurrage claim of the plaintiff by a further contention to the effect that, under the facts disclosed by the pleadings, the Lambert's Point Coal Exchange was the actual consignee of the coal shipped, not the Emmons Coal Mining Company, and as such recovery of the demurrage charges must be from it, and not from the defendant. As stated, *supra,* the cars were consigned to the shipper himself, 'care of the Lamberts Point Coal Exchange Pool.' Where goods

> are consigned to one person in care of another, by the general rule the title to the goods is in the consignee. It is true, exceptions to the rule may exist, but no facts appear in the present record to bring the shipments of the Coal Company within the scope of such exceptions."

The Commission in the *Smokeless Case* (85 I. C. C. at page 401), also ruled that the method of consignment constituted the transshipper the consignee for demurrage:—

> "The coal was consigned to individual shippers, 'care Lambert's Point Coal Exchange,' and the law seems to be well settled that the party to whom a shipment is consigned is the legal consignee and not the party in whose care the goods are shipped. At all times the individual shippers had sole control over the tonnage standing to their credit, subject only to the requirement that their orders must be handled through the manager of the Exchange. The record will not support the conclusion that the Lambert's Point Coal Exchange was the common consignee, nor that it was unreasonable not to make the Exchange the common consignee."

I. C. C. *vs.* D. L. & W. R. *et al.*, 220 U. S. 235, known as the "Forwarding Case," is relied upon by Emmons as supporting the theory that

the consignee was the Exchange. In that case the Interstate Commerce Commission had condemned as unreasonable a published tariff rule by which the carriers in effect undertook to decline to accept aggregated less-than-carload shipments of different owners as carload lots. The Circuit Court enjoined the Commission's order. This Court held that the order was within the Commission's administrative authority and could not be controlled by the Courts.

There is no resemblance between the facts of the Forwarding Case and the instant case. This Railway Company has not tried to forbid combination of shipments of different ownership into one consignment, nor have the shippers endeavored to combine their shipments. The Exchange members have agreed to swap cars of equivalent tonnage, preserving, however, individual responsibility for freight charges and for detention of cars containing equivalent tonnage of their shipments. The demurrage tariff is applied in the same way to the accounts of Exchange members as to accounts of shippers outside of the Exchange.

The opinion of the Supreme Court of Appeals of Virginia in James *et al vs.* Norfolk and Western Railway Company, 129 S. E. 321 (Virginia 1925), at page 322, recognizes that the "Forwarding Case" has no application to the Lambert's

Point Coal Exchange situation. The Court distinguishes the facts of that case from "the Lambert's Point Coal Exchange" which

> "was neither the shipper nor the consignee of any of the cars of coal which went into the pools, but the voluntary agency of the shippers which kept the records of cars to the credit of the various members in each pool, and through its general manager gave orders to the carrier to dump the equivalent coal of the consignee into the vessel which berthed to receive and transport the coal of that particular consignee. The coal was shipped from the mines, consigned to the particular members of the coal exchange, who paid the freight to the carrier and assumed all the obligations under the tariffs, and gave notice of the arrival of the vessel to receive his coal to the general manager of the exchange, who gave instructions to the carrier to dump equivalent coal, if the consignee had sufficient to his credit in the pool. The carrier performed no service for the coal exchange, and the title to the coal was in the consignee; therefore the principle of the 'Forwarding Case' is not applicable to this case and the court did not err in overruling the demurrer of the plaintiffs in error, nor their contention on the merits that the Lambert's Point Coal Exchange was consignee of the cars of coal and alone liable for the demurrage."

B.-2. The demurrages sued for are computed with sole reference to the governing demurrage tariff.

Assignments of Error 1, 3, 4, 5, 6, 7, and 8.
(R. 182-183.)

These assignments raise only the question whether the demurrage was computed in accordance with the tariff. The Railway Company agrees that demurrages must be computed in exact accord with the tariff and the tariff alone. The tariff under which these charges were assessed is known as Norfolk and Western Railway Tariff I. C. C. No. 2828-B, Record, pages 15 and 16.

It will be convenient to review the practice followed by the Railway Company in keeping the demurrage account of an Exchange member such as Emmons. When cars consigned to Emmons, in care of the Exchange, arrived at Lambert Point they were entered on Emmons' demurrage account in order of arrival. Notice of arrival was immediately sent or given Emmons and the detention was computed from the first seven A. M. thereafter, in accordance with Rule 3 (*a*). The date of release of a car is determined by Rule 3 (*b*). Under the provision of Rule 3 (*b*)-2,—(the substitution rule)—the date on which a car would have been released

if released in order of arrival will be substituted for the date on which equivalent tonnage was released on order of Emmons, and the detention computed on the basis of such substituted dates. In other words, the oldest car standing in Emmons' account is released on the demurrage record, although that car may not then have been actually dumped. In the demurrage computation against that car the date of notice of arrival is subtracted from the date of release, the result showing the total days' gross detention. From that total are subtracted all Sundays and legal holidays, in accordance with Rule 3 (*a*), and five days free time on each car, in accordance with Rule 2. If the total days' detention, after deducting all Sundays and holidays, is less than the five days free time allowed by the tariff, Emmons is given credits equivalent to the number of days by which it was less than five. If the total days' detention, less Sundays and holidays, exceeds the five days free time, Emmons is debited for the number of days of such excess. The credits and debits of each individual member are aggregated for "all cars released during the month," and the individual member is charged demurrage at the rate of $2.00 per car per day for the excess debits, if any, in accordance with Rule 4. If the individual's credits in a month exceed his debits

during the same month, on all cars released during that month, no demurrage is charged for that month.

Emmons argues that these demurrage charges were assessed on the authority of the Exchange rules instead of on the tariff, and are therefore invalid, because the Exchange rules were not filed with the Interstate Commerce Commission. The tariff fixed the charges and provided for the monthly calculation of demurrage; the substitution of tonnage; and calculation of demurrage on the basis of the date of arrival of the cars deducted from the date of registry of the vessel into which the particular consignee dumped equivalent coal. The charges were calculated by reference to the tariff alone.

The Exchange Rules were not published as a tariff. Publication is not required as these rules do not "in any wise change, affect, or determine any part or the aggregate of" charges or determine "the value of the service rendered to the * * * consignee": Section 6 of the Act to Regulate Commerce, paragraph 1, Vol. 8 U. S. Comp. Stat. §8569.

The decision of the Circuit Court of Appeals, at page 528 of the reported opinion (R. 178) answers this contention of Emmons in the following extract from that opinion (adopted almost

verbatim at page 328 by the Supreme Court of Appeals of Virginia in rendering its opinion in the case of *James*, et al., vs. *Norfolk and Western Railway Company, supra*):—

> "A study of the Tariff has convinced us also of the lack of force in defendant's further contention that plaintiffs' claim is invalid because based upon the Tariff *and* the rules of the Lamberts Point Coal Exchange, not upon the Tariff alone. We quite agree with Judge Thompson, whose order is the subject-matter of the instant writ of error, when he points out in his opinion that, while certain substitutions of coal may have been made under the rules of the Exchange, the demurrage charges were assessed entirely on authority and by virtue of the Tariff. The substitution of cars of one member for those of another, a matter of bookkeeping, was by authority of the Coal Exchange agreement, but the charges sought to be recovered by plaintiff were assessed only under the Tariff provisions which provide for demurrage from the end of the free time until the coal was ordered out by the shipper. Such provisions have not been essentially affected by the fact that there was a substitution of cars among members of the Exchange, when the situation thereafter between the shipper and the railroad is the same as before substitution, in that the former continued to have title to an amount of coal equal to that originally

shipped by him and the latter continued to have its cars detained, although not the identical cars, until the former ordered his coal unloaded."

Rule 3 (*b*)-1 of the tariff (defining release date) fixes the release date as the day on which the vessel registers for the cargo or fuel supply of which the coal dumped from the car into such vessel is a part. Then follows in the tariff rule an exception which is intended to be applied only in the absence of vessel registry date. In cases where the vessel does not in fact register, and only then, the date of actual dumping of the car is to govern release. Whether the main clause or the exception of rule 3 (*b*) 1 be applied, the following substitution rule 3 (*b*) 2 in either event is further to be applied and works a release in demurrage computations not of the actual car dumped but of the oldest car in order of arrival. But instead of using the exception where the main rule can not apply by reason of absence of vessel registry, Emmons seized upon rule and exception and seeks to apply both on the same car. Thus the vessel registry rule and the substitution rule are employed to release the oldest car and at the same time the exception is employed to release the car actually

dumped,—two cars, they argue, are released on the dumping of one. Our opponent reads the exception clause as if it were concurrent with the main clause. Note that the main clause provides for release on registry of vessel to receive the coal, "except that when" the coal is dumped before vessel registry the dumping date is the release date. The exception clause is only applicable as an alternative when there is no prior registry date.

The Interstate Commerce Commission approved the Railway Company's interpretation in the *Smokeless case,* 85 I. C. C. saying at pages 398 and 399:—

> "The basic contention of complainants is that the governing tariff did not authorize the collection of demurrage on a car after that car had actually been unloaded, and they rely particularly upon paragraph 1 of rule 3 (*b*) in support of this contention. In other words, if A's car was unloaded on the order of B, it should then have been released from demurrage because it was unloaded before the registry of A's vessel. Complainants further contend that under the substitution rule of paragraph 2, B's car should also have been released from demurrage at the same time, because the date upon which 'equivalent tonnage was actually delivered' became the release date of such car. As

assessed by defendant, demurrage continued to run against cars standing to the credit of any shipper, even though such cars had actually been unloaded, until he gave orders to dump equivalent tonnage, the date of such release being governed by the registry date of the vessel into which the coal was dumped, or by the date of unloading into the vessel if that took place prior to registry.

* * * * * * *

"While the tariff is clumsily worded, there can be no doubt that defendant's construction is in accord with its intent and that, so far as equity is concerned, complainant's contentions are without merit. However, a tariff must be strictly construed. In our opinion, defendant's interpretation" (the carrier is here referred to) "was correct. Paragraph 1 provides that a car shall be considered as released 'at time vessel registers for the cargo or fuel supply of which the coal * * * dumped into such vessel is a part,' and paragraph 2 permits the substitution of any car containing a similar grade of coal for the one ordered dumped. The substitution of dates is merely a bookkeeping arrangement. The exception contained in paragraph 1 can release a shipper from demurrage only when the car which is unloaded contains tonnage, equivalent or otherwise, which becomes a part of the cargo or fuel supply of the vessel as

the result of his order. If such cars are thus unloaded before the vessel registers, the date of such unloading, rather than the date of registration, determines the release of the shipper in the demurrage account. This is the meaning of the rule when read in its entirety."

Substantially the same tariff rules for substitution and release as applied to pooled coal were considered and approved by the Supreme Court of Appeals of Virginia in Smokeless Fuel Company *vs.* Chesapeake and Ohio Ry. Co., 128 S. E. 624 (Va. 1925), at page 630:—

"The fuel company insists that, when a substituted car (one of later arrival) is actually dumped into a ship, it is released under clause 1, and that the car for which it is substituted is also released by virtue of the substitution; that this is the price paid by the carrier for the privilege of substitution. If this be true, then there has been no substitution. The effect of the argument of the fuel company is that practically for every car dumped under clause 4 two cars are released from demurrage debits, although the railroad company has the use of only one of them. This loses sight of the prime object of demurrage charges, and especially fails to give effect to that provision of clause 4, declaring:

"'In this event the dates on which the substituted cars are delivered will be used in computing the detention of the cars for which they are substituted, so that as far as credit and debit days are concerned, the record will be the same as though the cars were delivered in the order of their arrival.'

"The substitution of the cars of one member for those of another is a mere 'matter of bookkeeping' authorized by the exchange agreement.

"Rule 3 is a demurrage tariff, intended to expedite transportation, and it would require very plain and unequivocal language to authorize the release of two cars, when only one was dumped and made available for use. The rule does not contain any such language. Clause 1 of rule 3 (*b*) refers to dumpings in the order of arrival. Clause 4 to dumpings '*otherwise* than in the order of arrival.' A car cannot be dumped in the order of arrival and also *otherwise* than in the order of arrival. The facts of the particular case must determine whether the dumping is to be done under clause 1 or clause 4. The two clauses cannot be applied to the same cars at the same time. The substitution provided for by clause 4 is of substantial benefit to shippers in permitting one car to be substituted for another, and in changing the date from which detention begins. Reading the rule as a whole, we find no authority for the contention that the dumping of the

substituted car operates to release, not only that car, but also the one for which it is substituted."

The argument is also made that avoidance of delay which would be entailed by switching for delivery of cars in the order of their arrival is a condition precedent to application of the substitution rule of the tariff. In common sense this can not be. The substitution rule would be quite impracticable of application if the railroad yard crew had to determine in each case where a substitution was permitted by the tariff whether delay would necessarily be avoided by the substitution.

Nor is the carrier's switching convenience which the tariff recites stated as a condition precedent. It is a recital of the motive or object sought to be attained by substitution. The condition of the right to substitute equivalents is that the carrier shall release the cars in the demurrage account in order of arrival, and this the carrier has done.

The argument is made that the dumping of the car of one Exchange member on the order of another constitutes a transfer "by written order and acceptance" within the meaning and opera-

tion of Rule 3 (*b*)-3 of the tariff (R. 16). The Court will note in this connection that Exchange members have agreed under the Exchange rules that the Exchange will take no cognizance of transfers or sales of tonnage between members,—see Exchange Rule 6 (R. 19). In fact there were, as we have seen, no transfers of tonnage between members in the sense of the tariff rule invoked. Rather there was a substitution of equivalents necessarily contemplated in all pooling arrangements and recognized, so far as demurrage consequences are concerned, by the substitution rule of the tariff. So the Interstate Commerce Commission understood and applied the rule as against this argument. The Commission, at page 399 of its opinion in the Smokeless case, *supra,* said:—

> "The tariff covered shipments to non-members of the Exchange as well as to members. Paragraph 3 of rule 3 (*b*) has reference to transfers of shipments by written order and acceptance, such as are occasionally made outside of any pooling arrangement. There were no transfers 'by written order and acceptance' within the pool which the terms of this paragraph can be construed to fit."

The opinion of the Circuit Court of Appeals in the instant case discusses this tariff rule for

transfers at page 527 of the reported opinion (R. 177):—

> "No transfers 'by written order and acceptance,' such as are contemplated by the rule, are under consideration in the present issue, and the section cannot be cited as authority for defendant's claim that it was released from the demurrage claimed in the present action.
>
> "As we read the Tariff, we are satisfied that it plainly contradicts defendant's contention that it absolves defendant from payment of demurrage upon cars unloaded in substitution of cars of another member of the Coal Exchange. Some clauses of it, each read by itself, may be lacking in clarity, but, read in conjunction with the entire context, they quite clearly sustain the interpretation of the plaintiff company."

Activities of some shippers may conceivably under a pooling plan bring it about that the aggregated free time of all cars in the pool is not exceeded in spite of the delays of some shippers.

Accordingly, Emmons argues that, in the absence of a showing that all cars in the pool were delayed in excess of the aggregated free time of all, the demurrage assessed is "constructive" or "fictitious" (R. 139). A pooling plan is conceivable in which the diligence of some shippers in releasing cars within the free time allowed by

the tariff might be turned to the benefit of other shippers who did not so release their cars—the unused free days of the diligent might be made available (by common consigneeship) to cancel the debit days of the slow shippers. No reason is perceived why the diligence of some should be made to inure to the benefit of others. The present plan expressly denies such cancelling of demurrages. And the tariff, as applied to the facts, has been found reasonable by the Commission. The Circuit Court of Appeals explains and answers this complaint at page 528 of the reported opinion (R. 179-180):—

> "The defendants (below) have attacked the tariff upon which the claim of the Railroad Company is based, and the practice of the Railroad Company thereunder, from still another angle. It will be remembered that the coal shipped by each member of the Coal Exchange was credited to him in the Exchange when it passed Bluefield, West Virginia, and after being so credited he was entitled to at once order the withdrawal of an equal amount of coal from the Exchange, although his own coal would not actually be delivered at Lamberts Point for several days. This arrangement was made possible by the substitution clause of the Coal Exchange Rules. The defendants have pointed out that this practice enabled the Railroad Company to charge demurrage although no

actual detention of its equipment beyond the free time had actually occurred. It is true, that when a shipper exercised his right to order an equal amount of coal out of the Pool as soon as his own coal had passed Bluefield, his order released cars in the Lamberts Point yard containing coal of another member of the Exchange, and there was no actual detention of equipment while his own cars were in transit to Lamberts Point.

"In setting forth this phase of their case, defendants have attacked the Tariff as unreasonable. In considering the question of the reasonableness of the Tariff, we must not overlook the fact that the above practice was one which inured to the benefit of members of the Coal Exchange as well as the Railroad Company, as it enabled them to avoid the expenses incident to delays of vessels awaiting arrival of the coal shipped, while it actually injured nobody, as demurrage was charged only from the date of arrival to the date the cars were ordered to be dumped, less the free time, as provided by Tariff. The shipper who had cars standing in the yard was not injured because another was allowed to substitute those cars for his own cars in transit. If there had been no power of substitution, demurrage would have been charged against his cars in just the same way.

"The Interstate Commerce Commission had the Tariff under discussion in the instant

case before it for consideration in the case of Smokeless Fuel Co. *vs.* Norfolk & Western Railway Co., 85 I. C. C. Rep. 395. The issues there involved were the same as those involved here. The Commission held the Tariff and the practice of the Railroad Company thereunder to be reasonable and proper. We need not discuss the extent to which the decision of the Commission controls us, because we find ourselves in full accord with it."

B.-3. The discharge of the rule for information was proper.

Assignment of Error 2. (R. 182.)

By this Assignment Emmons attacks the lower Court's refusal to require the Railway Company to furnish certain information as set forth in the assignment. In general the information sought related to the receipts and dumpings of other members of the pool and its object was to show how their dumping activities might have reduced Emmons' demurrages. But the correct application of the tariff made this information irrelevant and it was properly excluded.

And the Circuit Court of Appeals so held at page 529 of the reported opinion (R. 180):—

"The conclusion that no error existed in the judgment in so far as the main issues were concerned in effect disposes of that assignment of error relating to the refusal

of the District Court to order the discovery of certain matters on the part of the Railway Company. The information sought was relevant and material only in case the Coal Company were correct in its contentions, hereinbefore discussed, regarding the Tariff and the application of it; and those contentions failing, the second assignment of error falls with them."

CONCLUSION.

In conclusion we respectfully submit that the rulings and judgment of the Court below should be affirmed.

Respectfully submitted,

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Attorneys for Norfolk and Western Railway Company, Defendant-in-Error.

PHILADELPHIA, November, 1926.

SUPREME COURT OF THE UNITED STATES.

No. 70.—October Term, 1926.

Emmons Coal Mining Company and The Fidelity & Casualty Company of New York, Plaintiffs in Error, *vs.* Norfolk & Western Railway Company.	In Error to the United States Circuit Court of Appeals for the Third Circuit.

[January 3, 1927.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit by the Norfolk and Western Railway Company to recover demurrage on cars at Lambert's Point, Virginia, from the Emmons Coal Mining Company and its surety. An affidavit of defence upon matters of law was filed, but was held insufficient by the District Court, 287 Fed. Rep. 168, and judgment subsequently was entered for the plaintiff. The judgment was affirmed by the Circuit Court of Appeals. 3 F. (2nd) 525.

To facilitate the delivery of coal at tidewater some of the owners of mines upon the lines of the Railway made an arrangement with the latter by which the cars were sorted at Lambert's Point upon different tracks according to the quality of the coal, and delivery was made to their respective customers from the cars most convenient at the moment, irrespective of ownership, if the seller had that amount of coal on hand in cars within the space limits agreed. To work this out the parties formed an association, called the Lamberts Point Coal Exchange, with a manager who kept books in which he credited to each owner coal destined to the Point as soon as it passed Bluefield, West Virginia, noting its quality, and ordered delivery within the amount so credited, as required, to the owner's customers. If the delivery were required to be from the consignor's own cars, as it would be in the absence of agreement, of course if the cars were detained beyond the allowed time demurrage would be payable. When under the arrangement one member's cars were emptied to fill the order of another member, other cars with similar coal would have to be kept, in order to

satisfy the first member's right when it came to assert it, and it should pay as in the first case, since the delay would be the same to the railroad whichever of its cars were detained. The responsibility of the owner for them is the natural corollary of the benefit that each owner gets by having its order filled from the nearest cars.

In the present case the demurrage demanded is fixed by the foregoing rule. The plaintiffs in error say that by the tariff that governs the matter they can be charged only for the cars actually used and detained by them; that to make the tariff cover a substitution it must be modified by the rules of the Exchange, which cannot be done, and that if there is a claim against anyone, it is a claim against the Lamberts Point Coal Exchange.

The last point may be dispatched in a few words. The articles of organization of the Exchange provide that the member shall be responsible to the Railway for demurrage, and that the shipping instructions, &c., 'shall show as the consignee the name of the member for whose account shipped, followed by the words "care Lamberts Point Coal Exchange Pool—." ' The Coal Company's consignments were in accordance with the agreement, and by the agreement or without it made the Company the consignee. We come therefore to the tariff the construction of which is the only point much argued in the case.

The important clauses are in Rule 3, and Rule 4.

"(b) A car shall be considered as released:

"1. At the time vessel registers for the cargo or fuel supply of which the coal, coal briquets or coke dumped into such vessel is a part, except that when cars are unloaded before the vessel registers such cars shall be released when unloaded.

"2. To avoid delay that would be entailed in switching out and delivering on shipper's order, in actual sequence of arrival, cars containing the same grade of coal, as indicated by the identifying consigning names or numbers on the waybills, the dates on which cars should have been so released (as indicated by the record) will be substituted for the dates on which equivalent tonnage was actually delivered and the detention will be computed on the basis of such substituted dates.

"3. The dates shipments are transferred by written order and acceptance to another party shall be considered the date of release of the car for the account of the original consignee and subsequent detention shall be charged in the account of the new consignee without any free time allowance."

* * * * * * *

"Rule 4.—Demurrage Charges

"Settlement shall be made on the basis of detention to all cars released during the month. The date of arrival notice shall be subtracted from the date of release. From the total days detention to all cars thus obtained, deduct all Sundays and legal holidays following the date of arrival and five (5) days free time allowance for each car, except on cars containing coke for export deduct ten (10) days free time allowance for each car: the remainder, if any, will be the number of days to be charged at the rate of $2.00 per car per day. Excess credit days of any one month cannot be deducted from the excess debit days of another month."

These clauses were construed by the Interstate Commerce Commission in an able opinion as authorizing the 'substitution of any car containing a similar grade of coal for the one ordered dumped,' when the parties have so agreed, and as warranting the charges questioned here. They also were held reasonable as so construed. *Smokeless Fuel Co.* v. *Norfolk & Western Ry. Co.*, 85 I. C. C. 395. The matter is one upon which the opinion of the Commission would carry great weight, even if we thought its conclusion less obvious than we do. See also *Smokeless Fuel Co.* v. *Chesapeake & Ohio Ry. Co.*, 142 Va. 355. The fairness and reasonableness of it ought to prevail against meticulous arguments drawn from the fact that the rules are made with unassociated shippers most prominently in mind, or from rarely realized possibilities of demurrage being charged where coal is delivered on the credit of cars actually in transit from Bluefield, although those cars are not delayed. In the ordinary course of things cars will be kept on hand to answer the mine owner's credit, and it is for its as well as for the Railway's advantage that they need not be the very cars that the mine owner has used.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court. U. S.